RECORD AND BRIEFS

15-1509

No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, *ET AL.*, BY AND THROUGH, CWCAPITAL ASSET MANAGEMENT LLC, SOLELY IN ITS CAPACITY AS SPECIAL SERVICER,

Petitioner,

v.

THE VILLAGE AT LAKERIDGE, LLC, AND ROBERT ALAN RABKIN, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Bankruptcy courts can only confirm a chapter 11 plan of reorganization over a secured creditor's objection if at least one impaired, consenting class of creditors votes to accept the plan (excluding the votes of insiders). 11 U.S.C. § 1129(a)(10). This is known as "cramdown."

This case presents the following questions:

1. Whether an assignee of an insider claim acquires the original claimant's insider status, such that his or her vote to confirm a cramdown plan cannot be counted under 11 U.S.C. § 1129(a)(10);

2. Whether the appropriate standard of review for determining non-statutory insider status is the *de novo* standard of review applied by the Third, Seventh and Tenth Circuit Courts of Appeal, or the clearly erroneous standard of review adopted for the first time by the Ninth Circuit Court of Appeal in this action; and

3. Whether the proper test for determining non-statutory insider status requires bankruptcy courts to conduct an "arm's length" analysis as applied by the Third, Seventh and Tenth Circuit Courts of Appeal, or to apply a "functional equivalent" test which looks to factors comparable to those enumerated for statutory insider classifications as erroneously applied for the first time by the Ninth Circuit Court of Appeal in this action.

PARTIES TO THE PROCEEDINGS BELOW

The following list provides the names of all parties to the proceedings below:

Petitioner, who was the Appellant below, is U.S. Bank National Association, As Trustee, As Successor-In-Interest To Bank Of America, N.A., As Trustee, As Successor By Merger To LaSalle Bank National Association, As Trustee, For The Registered Holders Of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2005-GG3, Commercial Mortgage Pass Through Certificates, Series 2005-GG3 (the "Trust"), By And Through, CWCapital Asset Management LLC ("CWCAM"). CWCAM is a Special Servicer for the Trust.

Respondent, the debtor and Appellee below, is The Village at Lakeridge, LLC.

Robert Alan Rabkin, M.D. is a party-in-interest who purchased the $2.76 million insider claim for $5,000, but did not appeal the underlying orders or otherwise participate in these appeals.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner U.S. Bank National Association is a wholly owned subsidiary of U.S. Bancorp, a publicly held company. No publicly-held entity owns 10% or more of the stock of U.S. Bancorp.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner U.S. Bank National Association, et al., by and through CWCapital Asset Management, solely in its capacity as Special Servicer, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix ("App.") A., *infra*, pp. 1a-27a) is reported as *U.S. Bank N.A. v. The Village at Lakeridge, LLC (In re The Village at Lakeridge, LLC)*, 814 F.3d 993 (9th Cir. 2016).

The opinion of the United States Bankruptcy Appellate Panel of the Ninth Circuit (App. B., *infra*, pp. 28a-60a) is not reported in the Bankruptcy Reporter, but is available at *The Village at Lakeridge. LLC v. U.S. Bank National Association (In re The Village at Lakeridge, LLC)*, BAP No. NV-12-1456, 2013 WL 1397447 (B.A.P. 9th Cir. Apr. 5, 2013).

The opinion of the United States Bankruptcy Court for the Central District of California granting U.S. Bank's Motion to (A) Designate Claim of Robert Rabkin as an Insider Claim, or (B) Disallow Such Claim for Voting Purposes (August 20, 2012) (App. C, *infra*, pp. 61a-70a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 2016. Petitioner filed a motion for *en banc* review on February 22, 2016, which was denied on March 16, 2016 (App. D, pp. 71a-73a).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 4 of the United States Constitution empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States."

Section 1129(a) of title 11 of the United States Code (the "Bankruptcy Code") provides in pertinent part that:

> (a) The court shall confirm a plan only if all of the following requirements are met:
>
> . . .
>
> (10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

11 U.S.C. § 1129(a)(10).

STATEMENT OF THE CASE

I. Background

A. Assignment of Insider Claim and Subsequent Vote to Accept Plan

All of the facts on appeal are undisputed. This appeal arises from a single asset real estate bankruptcy case involving only two creditors. Petitioner is the senior secured creditor of The Village at Lakeridge, LLC ("Debtor" or "Respondent"), and the only prepetition creditor of the Debtor's bankruptcy estate. The other creditor is Robert Rabkin ("Rabkin"), the assignee who purchased a $2.76 million insider claim from his girlfriend (who is a member of the Debtor and its corporate designee) for $5,000 just days prior to the Debtor's disclosure statement hearing. The Debtor relied on Rabkin's single vote in an attempt to confirm the Debtor's First Amended Plan of Reorganization (the "Plan") over Petitioner's objection. It is undisputed that but for the assignment to Rabkin, the insider claim could not be voted to confirm the Plan under 11 U.S.C. § 1129(a)(10).

B. Motion to Designate and Order Designating Rabkin as an Insider

The Bankruptcy Court granted in part Petitioner's Motion to (a) Designate Claim of Robert Rabkin as an Insider Claim, or (b) Disallow Such Claim for Voting Purposes Pursuant to 11 U.S.C. §§ 1126(e), 1129(a) and 105(a) (the "Designation Motion"), holding that Rabkin's vote could not be considered to determine acceptance of the Plan under 11 U.S.C. § 1129(a)(10) because Rabkin assumed the original claimant's insider status when he acquired the insider claim. Accordingly, on August 20, 2012, the Bankruptcy Court entered an order granting the Designation Motion in part, holding that the Plan was not

confirmable because the Debtor did not have the consenting, impaired class necessary to confirm the Plan (the "Designation Order"). (App. C, pp. 67a-68a).

In making its ruling, the Bankruptcy Court applied the general law of assignment to preclude an assignee of an insider claim from voting to confirm a plan. (*Id.* at 68a). The Court followed, among other things, the rationale of the Ninth Circuit in an unpublished decision, which concluded that an assignee of an insider claim could not vote to accept a cramdown plan for purposes of 11 U.S.C. § 1129(a)(10) because the assignee acquired the original claimant's insider status:

> Were courts to allow purchasers of insider claims to approve Chapter 11 plans without any judicial scrutiny, "[d]ebtors unable to obtain the acceptance of an impaired creditor simply could assign insider claims to third parties who in turn could vote to accept. This the court cannot permit."

Wake Forest Inc. v. Transamerica Title Ins. Co. (In re Greer West Inv. Ltd. P'ship), 81 F.3d 168, 1996 WL 134293, at *2 (9th Cir. Mar. 25, 1996) (unpublished) (quoting *In re Heights Ban Corp.*, 89 B.R. 795, 799 (Bankr. S.D. Iowa 1988)). (*See* App. C, p. 68a).

The Debtor appealed the Designation Order, asserting that the Bankruptcy Court erred when it denied plan confirmation on the basis that Rabkin acquired the same status as a statutory insider when he purchased the insider claim. Petitioner filed a cross appeal from the portion of the Designation Order holding that Rabkin was not a non-statutory insider for purposes of Section 1129(a)(10), asserting that the Bankruptcy Court (a) applied the wrong legal

standard for determining non-statutory insider status, and (b) erroneously concluded that Rabkin was not a non-statutory insider despite Rabkin's romantic and business relationship with the Debtor's principal and corporate designee, and uncontroverted evidence showing that the assignment was not an arm's length transaction.

C. Ninth Circuit Bankruptcy Appellate Panel's Decision

On April 5, 2013, the Ninth Circuit Bankruptcy Appellate Panel (the "BAP") reversed the Bankruptcy Court's holding that Rabkin's vote could not be considered to determine acceptance of the Plan, and affirmed the Bankruptcy Court's holding that Rabkin was not a non-statutory insider. (App. B, pp. 41a-50a).

On April 19, 2013, Petitioner filed a Notice of Appeal to the Ninth Circuit.

D. Ninth Circuit Court of Appeal's Decision

On February 9, 2016, the Ninth Circuit issued a published decision affirming the BAP's ruling on two legal grounds: First, the Ninth Circuit held that a third-party assignee of an insider claim could vote to confirm a cramdown plan even though the claim could not be voted in the hands of the original claimant. The Ninth Circuit held that the general law of assignment did not apply to the sale of insider claims because (a) insider status is not a "property of a claim," and (b) a person's insider status is "a question of fact that must be determined after the claim transfer occurs." *Village at Lakeridge*, 814 F.3d at 999-1000; (App. A., p. 10a). Second, in a 2-1 decision, the Panel majority applied a clearly erroneous standard of review for determining non-statutory insider status, and deferred to the Bankruptcy Court's application of only a few factors for determining non-statutory insider status without

regard to the "arm's length" test applied by the Third, Seventh and Tenth Circuit Courts of Appeal. *Id.* at 999-1000, 1002-03 & n.14, and 1006-07; (App. A, pp. 10a-11a, 15a-16a).

The Bankruptcy Court and the Panel majority declined to apply the "arm's length" test employed by other circuits, or address the following undisputed facts which had a bearing on whether the insider's assignment of the insider claim to Rabkin was an arm's length transaction: (a) Rabkin and Bartlett's close romantic and business relationship; (b) Bartlett's failure to shop the claim to anybody other than Rabkin; (c) Debtor's failure to serve Rabkin with any bankruptcy papers; (d) Rabkin's lack of knowledge about the bankruptcy case or the proposed treatment of the Insider Claim under the Plan; (e) Rabkin's failure to review the relevant documents including the Notice of Assignment of Claim, the Disclosure Statement, the Plan, the Schedules; (f) Rabkin's lack of knowledge as to whether the original claimant filed a Proof of Claim or notice of assignment; (g) Rabkin's lack of due diligence; and (h) Rabkin's failure to accept an offer to sell his claim for twice as much as provided under the Plan. As the dissent noted, the Bankruptcy Court did not even inquire whether the assignment was an arm's length transaction. *Id.* at 1005-06 (App A., p. 23a) (J. Clifton, dissenting).

The Panel majority also enunciated a new test for determining non-statutory insider status that looks to whether (i) the closeness of a creditor's relationship with a debtor "**is comparable to that of the enumerated insider classifications in § 101(31)**" and (ii) the "transaction is negotiated at less than arm's length." *Id.* at 1001 (emphasis added) (citation omitted); (App. A, p. 13a). In his dissent, Judge Clifton argued that

the Panel majority (a) improperly applied a clearly erroneous standard of review rather than the *de novo* standard of review applied by other Circuits, and (b) failed to apply the arm's length test employed by all other Circuits for determining non-statutory insider status as adopted by other circuits. *Id.* at 1006-07 (J. Clifton, dissenting); (App. A., pp. 23a-25a).

On February 22, 2016, Petitioner timely filed a Petition for Rehearing *En Banc*, which was denied on March 16, 2016. (App. D, p. 73a).

On March 22, 2016, Petitioner filed a motion to stay the mandate, which was granted on April 6, 2016.

REASONS FOR GRANTING THE PETITION

I. Whether an Insider Claim Can be Transferred to a Third Party With the Purpose of Circumventing the Bankruptcy Code's Statutory Prohibition Against Insider Voting Under 11 U.S.C. § 1129(a)(10) Raises an Important Federal Question that Warrants this Court's Review

One of the fundamental principles of bankruptcy law is that insider votes cannot be considered to confirm a cramdown plan over the objection of secured creditors. This statutory prohibition against insider voting is codified in 11 U.S.C. § 1129(a)(10).

The Bankruptcy Court, following overwhelming authority, correctly held that the vote of an assignee of an insider claim could not be considered to determine acceptance of the Plan by an impaired class of claims under 11 U.S.C. § 1129(a)(10) because an assignee of an insider claim acquired the same status as a

statutory insider. [1] Under the general law of assignment, which is recognized in bankruptcy cases, an assignee acquires the claim subject to all of its disabilities. Having found Rabkin to be a statutory insider as a result of his acquisition of the insider claim, the Bankruptcy Court denied confirmation because the Debtor did not have an impaired, consenting class absent Rabkin's vote.

The Ninth Circuit affirmed the BAP's reversal of the Bankruptcy Court's decision with very little analysis, concluding that the general law of assignment does not apply to the assignment of claims for purposes of 11 U.S.C. § 1129(a)(10), and that a person's insider status is a question of fact that must be determined after the claim transfer occurs. The Court noted that "bankruptcy law would contain a procedural inconsistency wherein a claim would retain its insider status when assigned from an insider to a non-insider, but would drop its non-insider status when assigned from a non-insider to an insider." (App. A, p. 11a) (citing *Applegate*, 133 B.R. at 833; *Holly Knoll*, 167 B.R. at 385). This rationale is inconsistent with the purpose of 11 U.S.C. § 1129(a)(10), which is to disqualify insider voting for purposes of plan confirmation. Under the general law of assignment, assignment of an insider claim, as occurred here, transfers the disability of insider status to the assignee. This doctrine comports with the legal

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[1] *See* App. C, pp. 67a-68a, ¶¶ 6 and 8 (citing *In re Holly Knoll P'ship*, 167 B.R. 381, 385 (Bankr. E.D. Pa 1994); *In re Applegate Prop., Ltd.*, 133 B.R. 827, 833 (Bankr. W.D. Tex. 1991); *In re Heights Ban Corp.*, 89 B.R. 795, 799 (Bankr. S.D. Iowa 1988); and *Greer West, supra*, 81 F.3d 168, 1996 WL 134293, at *2).

principle of *"nemo dat qui non habet"* (no man gives that which he did not have).

The insider should not be able to evade the statutory prohibition against insider voting by simply assigning his or her claim. Yet, the Ninth Circuit's ruling effectively held that insider claims can be transmuted for voting purposes if transferred to friendly third parties.

A. The Ninth Circuit's Ruling Permitting Debtors to Circumvent the Bankruptcy Code's Statutory Prohibition Against Insider Voting Raises Questions of Exceptional Importance

The Opinion below raises questions of exceptional importance that extend to virtually every chapter 11 bankruptcy case where a debtor does not have sufficient votes to confirm a cramdown plan. The Opinion creates a judicial loophole to the statutory prohibition against insider voting. If the decision is not reversed, every debtor who would otherwise be unable to confirm a plan, absent the vote of a claim held by an insider, will be given a powerful weapon to game the system by assigning insider claims to friendly third parties for a nominal amount who will vote to accept a debtor's plan. As Judge Clifton noted in his dissent:

> [T]he majority opinion effectively renders that statutory requirement meaningless. Under the holding here, insiders are free to evade the requirement [of having at least one class of impaired creditors who has accepted the plan, "determined without including any acceptance of the plan by any insider"] simply by transferring their interest for a nominal amount (perhaps a few peppercorns) to a

> friendly third party, who can then cast the vote the insider could not have cast itself.

Village at Lakeridge, 814 F.3d at 1007 (J. Clifton, dissenting); (App. A, p. 26a).

Other legal scholars have noted the controversial nature of this decision. *See* Joel F. Newell, *Trading Claims to Shed Insider Status: Village at Lakeridge*, 1 Norton Bankr. L. Adviser 2, at 4–5 (2016) (noting that factual analyses will matter more in future cases as a result of the decision, opining that it is possible that the majority's opinion will widen the circuit split as to what constitutes impairment, and suggesting that the ruling may extend to other areas including claims disallowance and avoidance litigation under 11 U.S.C. §§ 502(d) and 547); Weekly News & Comment, *9th Circuit Splits Over Non-Statutory Insiders*, 62 Bankr. Ct. Dec. News 4, Mar. 3, 2016, at 1 (inquiring whether the Ninth Circuit "effectively negate[d]" 11 U.S.C. § 1129(a)(10)); Marshall E. Tracht, *Bankruptcy: Close Personal Relationship Not Enough for Insider Status*, 45 REAL EST. L. REP. 3, Apr. 2016, at 1 (noting that the protection against insider voting under the Bankruptcy Code has been called into question); Case Comment, *Third Party Creditor Holding Claim Originally Owned by Debtor's Parent Entity May Vote for Cramdown Plan, Even Though Claim Was Purchased for Far Less than Full Value and Creditor Had Close Personal Relationship with Member of Parent's Board of Directors*, Comm. Fin. News., Feb. 22, 2016, at 2 (casting doubt on the Ninth Circuit's rationale to permit assignees of insider to vote claims that could not be voted in the hands of the original claimant); *In re Village at Lakeridge, LLC.: Ninth Circuit Clarifies Who is Considered Non-Statutory*

Insider, Thompson Reuters, Practical Law Bankruptcy (Mar. 25, 2016), located at http://us.practicallaw.com/w-001-4934, p.3 (noting that the decision "circumvents or avoids the statutory requirements of section 1129(a)(10) of the Bankruptcy Code that at least one impaired class under the plan accepted the plan without counting ballots cast by insiders. Therefore the insider's vote is essentially preserved"); *Chapter 11 Plan Process: Overview*, Thompson Reuters, Practical Law Resource (2016), p. 20 (opining that the decision "may create an opportunity for debtors to avoid the statutory requirements of section 1129(a)(10) . . . .").

The Opinion does not address contrary authority recognizing the general law of assignment in bankruptcy (including conflicting case law in the Ninth Circuit), but concludes without analysis that "[b]ecause insider status is not a property of a claim, general assignment law . . . does not apply." *Village at Lakeridge*, 814 F.3d at 1000; (App. A., p. 10a). The Ninth Circuit's conclusion is neither supported by the statute, nor the legislative history or applicable case law.

Section 1129(a)(10) permits cramdown only if at least one impaired **class of claims** accepts the plan, determined "without including any acceptance of the plan by any insider." The phrase, "without including any acceptance of the plan by any insider" cannot be read in isolation, but must be read in the context of voting "claims" to give meaning to section 1129(a)(10) and the other provisions of the Bankruptcy Code. "[C]ourts must be mindful, particularly when examining the Bankruptcy Code, that statutory interpretation is 'a holistic endeavor.'" *In re KB Toys, Inc.*, 736 F.3d 247, 251 (3d Cir. 2013) (quoting *Official*

Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548, 559 (3d Cir. 2003) (en banc)). Thus, "courts 'must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Id.* (quoting *Cybergenics*, 330 F.3d at 559); *see also Village at Lakeridge*, 814 F.3d at 1007 (J. Clifton, dissenting); (App. A, p. 26a) (recognizing that the court "must 'interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.' *Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991). . . .").

Nothing contained in Sections 101(31), 1126(e) or 1129(a)(10) of the Bankruptcy Code indicates that Congress intended to abrogate the general law of assignments when determining whether a class of claims is impaired for purposes of plan confirmation.[2] **"In the absence of . . . specific language. . . Congress intended that the general law of assignment remains applicable."** *Boyajian v. New Falls Corp. (In re Boyajian)*, 564 F.3d 1088, 1091 (9th Cir. 2009) (emphasis added). In order to give meaning to the statutory prohibition against insider voting, an assignee of an insider claim must be prohibited from voting the claim without regard to whether the assignee is independently an insider. Otherwise, the claim in the hands of the assignee would be afforded

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[2] "[T]he scant legislative history on § 1129(a)(10) provides virtually no insight as to the provisions intended role. . . ." *Western Real Estate Equities, L.L.C. v. Village at Camp Bowie I, L.P. (In re Village at Camp Bowie I. L.P.)*, 710 F.3d 239, 246 (5th Cir. 2013) (citations omitted).

better treatment than in the hands of the original claimant. Section 1129(a) would be rendered meaningless if the insider status could be easily cleansed by simply assigning the insider claim.[3]

Neither the rationale in *Holly Knoll,* 167 B.R. at 385 nor *Applegate,* 133 B.R. at 833 are inconsistent with this conclusion. In both cases, the courts noted the applicability of general assignment law in bankruptcy cases, but recognized a narrow exception where the assignee's pre-existing status as a statutory insider could not be cleansed by acquiring a non-insider claim. In both cases, the courts were concerned about insider manipulation to evade the statutory prohibition against insider voting under section 1129(a)(10) by acquiring and voting non-insider claims. Neither case supports the Ninth Circuit's conclusion that general assignment law is inapplicable when an insider claim is assigned to a friendly third party who then votes the claim to facilitate an otherwise uncomfirmable cramdown plan. Insider status necessarily follows the insider claim to avoid granting an assignee greater rights than the claim had in the hands of the original claimant.

The prohibition against insider voting protects creditors from having to fight a cramdown plan premised on the acceptance by a class of creditors holding insider claims. *In re 266 Washington Assocs.*, 141 B.R. 275, 287 (Bankr. E.D.N.Y. 1992). Unless

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[3] In the instant case, it is undisputed that absent the assignment, Rabkin had no claim to vote. In addition, bankruptcy law makes clear that the transfer of a claim constitutes a substitution, but does not transform the claim. *See* FED. R. BANKR. P. 3001.

certiorari is granted, exactly the opposite result will follow where virtually any debtor will be able to easily manufacture an impaired assenting class by simply assigning an insider claim to a friend.

An insider's ability to assign its claim to friendly third parties who could vote such claim renders meaningless the prohibition against insider voting, and will undoubtedly open the floodgates to bankruptcy filings in the Ninth Circuit and elsewhere by encouraging debtors to transfer insider claims merely to evade the statutory restriction against insider voting.

B. The Ninth Circuit's Rejection of the General Law of Assignment in Bankruptcy Will More Broadly Impact Bankruptcy Cases Involving Claims Trading

In addition to impacting the confirmability of chapter 11 plans premised upon the transfer (and subsequent vote) of insider claims, the Ninth Circuit's ruling casts a wider net under federal bankruptcy law, and can affect a creditor's liability in virtually all bankruptcy cases filed under chapters 7, 9, 11 and 13 for preferential transfers, fraudulent conveyances, disallowance or recharacterization of claims, and equitable subordination, among other things.

Numerous courts, including the Third, Sixth, Eighth and Ninth Circuit Courts of Appeal, have recognized the applicability of the general law of assignment in bankruptcy cases in various contexts including claims disallowance, subordination, and preferential transfers, among other things. *See, e.g., KB Toys*, 736 F.3d 247 (applying general assignment law to disallow claim under 11 U.S.C. § 502(d)); *Goldie v. Cox*, 130 F.2d 695, 720 (8th Cir. 1942) (in the context of claim disallowance, holding that "[a]n assignee

stands in the shoes of the assignor and subject to all equities against the assignor [and] [u]nless these claims. . . can be allowed to the claimant, the assignee would fare likewise") (citing *Fidelity Mut. Ins. Co. v. Clark*, 203 U.S. 64, 74, 27 S.Ct. 19, 51 L.Ed. 91 (1906)); *Swarts v. Siegel*, 117 F. 13, 15 (8th Cir. 1902) (holding in the context of claim subrogation under section 57i of the Bankruptcy Act of 1898 (which preceded 11 U.S.C. § 502(d)) that "one who holds the rights or claims of another by subrogation takes them subject to the limitations and disqualifications attached to them in the hands of his predecessor. He has no higher or better rights than those which the first holder possessed. . . ."); *Boyajian*, 564 F.3d at 1091 (applying general assignment law in nondischargeability action under 11 U.S.C. § 523(a)(2)(B)); *Enron Corp. v. Springfield Assocs., L.L.C. (In re Enron Corp.)*, 379 B.R. 425, 435-36 (S.D.N.Y. 2007) (recognizing the applicability of general assignment law in the context of equitable subordination under 11 U.S.C. § 510(c) and disallowance under 11 U.S.C. § 502(d)); *Ward v. Sun Valley Foods Co., Inc.*, 212 Fed. Appx. 386, 391 (6th Cir. 2006) (unpublished) (denying successor attorney's application for attorney's fees and costs incurred by predecessor law firm, which were assigned to attorney, because predecessor law firm agreed to waive collection of such fees as part of a settlement of a malpractice action, concluding that "it is a fundamental rule of the law of contract that the assignee stands in the shoes of the assignor, possessing the same rights and remaining subject to the same defenses as the assignor") (citation omitted); *Beal Bank USA v. Windmill Durango Office, LLC (In re Windmill Durango Office, LLC)*, 481 B.R. 51, 65–66 (B.A.P. 9th Cir. 2012) (denying motion of claims purchaser to change vote in order to block

confirmation of a cramdown plan, reasoning that "allowing an assignee-creditor to change the vote previously cast by the assignor undermines a basic principle of assignments.'").

The Ninth Circuit's refusal to apply general assignment law for purposes of plan voting conflicts with circuit court opinions applying general assignment law to other provisions of the Bankruptcy Code. The Third Circuit, for example, has held that when the recipient of a preferential transfer assigns his claim to a third party, the claim must nevertheless be disallowed under section 502(d) of the Bankruptcy Code even though the assignee itself did not receive a preferential transfer:

> If the original claimant could transfer the claim for value to a transferee, the original claimant would receive value for a claim that would otherwise be disallowed and the transferee, who would receive the claim "washed" of its disability, could then share in the distribution of estate assets. . . .

KB Toys, 736 F.3d at 252.

The Ninth Circuit similarly applied general assignment law to a nondischargeability action commenced by an assignee under Section 523(a)(2)(B). Section 523(a)(2)(B) provides that a discharge does not discharge an individual debtor from any debts for money, property, services or credit obtained by the use of a materially false statement in writing on which "the creditor to whom the debtor **is liable** for such money, property, services, or credit reasonably relied . . . ." 11 U.S.C. § 523(a)(2)(B) (emphasis added). The Ninth Circuit held that the assignee of a claim that was based on the debtor's false financial

statements could bring a nondischargeability action even though the assignee did not itself reasonably rely on the debtor's material false statements when it purchased the claim. *Boyajian*, 564 F.3d at 1091. As the Ninth Circuit noted:

> Congress was undoubtedly aware that under general principles of assignment law an assignee steps into the shoes of the assignor. **Had Congress wished for assigned debts to be treated differently under § 523(a)(2)(B), it would have done more than rely on the word "is" in subsection (iii). In the absence of . . . specific language, we believe that Congress intended that the general law of assignment remains applicable.** That is, assuming [the assignee] was indeed the recipient of a general assignment of the original judgment, it can stand in the shoes of its assignor and pursue a nondischargeability action under § 523(a)(2)(B).

Id. (emphasis added).

In the instant case, the Panel did not address why the general law of assignment applied in *Boyajian* or in *KB Toys,* but should be disregarded in this case. Nothing contained in Sections 101(31), 1126(e), 1129(a)(10) or any other provision of the Bankruptcy Code indicates that Congress intended to abrogate the general law of assignment when determining what constitutes an insider claim for purposes of plan confirmation. Absent specific language to the contrary, Congress intended the general law of assignment to apply. *Boyajian*, 564 F.3d at 1091

There is no legitimate policy reason for granting assignees greater rights than the original claimants in bankruptcy. Unlike trade creditors, assignees are not involuntary creditors who may often lack the ability to know that they were transacting business with an insolvent entity. "[C]laim purchasers, however, are entities who knowingly and voluntarily enter the bankruptcy process . . . . [A] purchaser should know that it is taking on the risks . . . attendant to the bankruptcy process . . . . [A] claim purchaser's opportunity to profit is partly created by the risks inherent in bankruptcy. Disallowance of a claim . . . is among these risks . . . ." *KB Toys*, 736 F.3d at 255. *See also In re Metiom, Inc.*, 301 B.R. 634, 642-43 (Bankr. S.D.N.Y. 2003) ("[T]he assignment should not, and does not, affect the debtor's rights vis-a-vis the claim; **it is incumbent, instead, on the prospective assignees to take into account possible claim defenses when they negotiate the terms of their assignments.**") (Emphasis added).

In sum, the Ninth Circuit's decision, if left undisturbed, creates a troubling precedent. Chapter 11 debtors that have no hope of confirming a plan due to the lack of an impaired, consenting class will be motivated to assign their insider claims to third parties as a way to "game" the system and circumvent the statutory prohibition against voting insider claims. While the Panel majority noted that bankruptcy courts can still deny plan confirmation if a plan is not proposed in good faith, or fails to comply with other provisions of the Bankruptcy Code (App., Ex. A, p. 12a), these are different and independent grounds for denial of plan confirmation. The Bankruptcy Code does not recognize an exception that would cleanse insider status by simply assigning an insider claim to third parties. Creditors should not

have to rely upon an adjudication of factual issues to determine whether the assignment of an insider claim and subsequent vote by the assignee in favor of a cramdown plan, was proposed in bad faith, or whether the plan complies with other provisions of the Bankruptcy Code.

II. Certiorari Should be Granted to Resolve a Split Among the Circuits Regarding the Correct Standard of Review for Determining Non-Statutory Insider Status, Which Will Impact Many Areas of Federal Bankruptcy and Fraudulent Conveyance Law

Supreme Court review is also necessary to resolve a split among the circuits concerning the proper standard of review for determining non-statutory insider status.

A. This Case Presents an Ideal Vehicle to Resolve the Circuit Split

The Panel majority's review of the Bankruptcy Court's determination of non-statutory insider status for clear error directly conflicts with the standard of review employed by the majority of circuit courts in the Third, Seventh, Tenth and Eleventh Circuits, which hold that questions of insider status are mixed questions of law and fact to be reviewed *de novo*. *See Schubert v. Lucent Tech. Inc. (In re Winstar Comm'ns., Inc.)*, 554 F.3d 382, 395 (3d Cir. 2009) (recognizing circuit split, but concluding that the issue of insider status "is best characterized as a mixed question of law and fact" and exercising "'plenary review of the lower court's interpretation and application of those facts to legal precepts'") (citing *Schlumberger Res. Mgmt. Serv., Inc. v. CellNet Data Sys., Inc. (In re CellNet Data Sys., Inc.)*, 327 F.3d 242, 244 (3d Cir. 2003) (other citations omitted)); *In re*

Longview Aluminum. L.L.C., 657 F.3d 507, 509 (7th Cir. 2011) ("The question of insider status is regarded as a mixed question of law and fact" to be reviewed de novo) (citations omitted); *In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996) (recognizing that the "standard of review to be applied to a bankruptcy judge's findings on insider status has been the subject of some debate", but concluding that "the question is properly characterized as a mixed question of law and fact") (citations omitted); *Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1275 (10th Cir. 2008) (same); *Miami Police Relief & Pension Fund v. Tabas (In re The Florida Fund of Coral Gables, Ltd.)*, 144 Fed. Appx. 72, 74 (11th Cir. 2005) (unpublished) ("We agree with the Seventh and Fifth Circuits that '[t]he question under section 101(31) is whether the historical facts found by the bankruptcy court meet the [Bankruptcy] Code's open-ended definition of an insider. We think that question is properly characterized as a mixed question of law and fact.'") (citing *Krehl*, 86 F.3d at 742). But *see Fabricators, Inc. v. Tech. Fabricators, Inc. (In re Fabricators, Inc.)*, 926 F.2d 1458, 1464, 1466 (5th Cir. 1991) (acknowledging that "when a finding of fact is premised on an improper legal standard, that finding loses the insulation of the clearly erroneous rule", but later stating that "[a] determination of insider status is a question of fact and . . . subject to the clearly erroneous standard of review"); *Koch v. Rogers (In re Broumas)*, Nos. 97-1183, 97-1182,1998 WL 77842, at *8 (4th Cir. Feb. 24, 1996) (unpublished) (finding that the bankruptcy court's determination of insider status was not clearly erroneous considering the transferee's relationship with the transferor as including "creditor and debtor, principal and agent, joint venturers, attorney and client, landlord and tenant, and close friends").

As Judge Clifton noted in his dissent, "the problem here is not with the facts as found by the bankruptcy court but with the legal test that the bankruptcy court applied."

> What standard did the bankruptcy court apply to determine whether this transaction was conducted at arm's length, by the parties acting like they were strangers? We don't know, because the bankruptcy court order never discussed the concept. At a minimum, this makes Rabkin's status a mixed question of law and fact, subject to *de novo* review. *See In re Bammer*, 131 F.3d 788, 792 (9th Cir. 1997) ("Mixed questions presumptively are reviewed by us de novo because they require consideration of legal concepts and the exercise of judgment about the values that animate legal principles.")

Village at Lakeridge, 814 F.3d at 1006; (App. A, p. 24a).

Based on the Panel majority's improper application of the clearly erroneous standard of review, the Panel majority afforded complete deference to the Bankruptcy Court's findings.[4] Had it

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[4] As Judge Clifton urged in his dissent, the Panel majority should have considered the Bankruptcy Court's failure to refer to an "'arm's length transaction' as well as its failure to provide a sufficient basis for a finding that Rabkin and Bartlett were unrelated or dealt with each other as strangers." *Id.* Because the Panel gave improper deference to the Bankruptcy

not done so, the Panel majority implicitly acknowledged that they would have joined Judge Clifton in in finding that Rabkin was a non-statutory insider. *Id.* at 1002-03 & n. 14; (App. A, pp. 15a-16a & n. 14).

This Court has previously granted certiorari to resolve circuit splits involving the applicable standard of review. For example, in *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, — U.S. —, 135 S. Ct. 831 (2015), the Court recently described the issue on review as "requir[ing] us to determine what standard the Court of Appeals should use when it reviews a trial judge's resolution of a underlying factual dispute." *Id.* at 835. The Court considered whether "the Court of Appeals [should] review the district court's findings *de novo* as it would review a question of law? Or, should it review that factfinding as it would review a trial judge's factfinding in other cases, namely by taking them as correct 'unless clearly erroneous?'" *Id.*

Court's findings, it declined to consider undisputed facts having a bearing on the lack of an arm's length transaction including Rabkin and Bartlett's close romantic and business relationship, Bartlett's failure to shop the claim to anybody other than Rabkin, and Rabkin's failure to accept an offer to sell his claim for twice as much as provided under the Plan, among other things. After considering these undisputed facts, Judge Clifton found that a ruling that Rabkin is not an insider absurd on its face. *See Village at Lakeridge*, 814 F.3d at 1004-05 (J. Clifton, dissenting); (App. A., pp. 24a-25a).

Similarly, this case is an ideal vehicle for the Court to resolve the circuit split; it presents a precise question of law with no material factual disputes.

B. The Question Presented Regarding the Standard of Review for Determining Non-Statutory Insider Status Impacts Many Areas of Bankruptcy Law Requiring Determinations of Insider Status

The question presented is of pressing national importance in bankruptcy law, and will have far-reaching effect not only for future plan confirmation fights, but in many areas of bankruptcy law that often hinge upon a determination of insider status, including fraudulent conveyance and preferential transfer litigation under §§ 547 (applying a one year lookback period for insider transfers), 548 (avoiding certain transfers made to insiders, and case law recognizing that insider transfers are a "badge of fraud"), and 550(c) (authorizing trustees to recover the value of the property transferred to the benefit of a creditor that was an insider within one year before the bankruptcy filing), objections to discharge under § 727(a)(7) (permitting denial of discharge if the debtor committed certain enumerated acts within one year before the bankruptcy filing or during the bankruptcy case, concerning an insider), and even insider transactions subject to the UNIFORM FRAUDULENT TRANSFER ACT ("UFTA"), §§ 4(b) and 5(b) and the UNIFORM VOIDABLE TRANSACTIONS ACT ("UVTA"), §§ 4(b) and 5(b), where cases frequently turn on whether a creditor or transferee is an insider.

Absent the Court's resolution of this issue, appellate courts in the Ninth Circuit and elsewhere will defer to a bankruptcy court's determination of non-statutory insider status under a clear error

standard of review, whereas courts in the Third, Seventh and Tenth Circuits will have a more uniform body of case law for determining non-statutory insider status. This circuit split will encourage forum shopping.

III. Certiorari Should be Granted to Resolve a Split Among the Circuits Regarding the Proper Test to be Employed to Determine Non-Statutory Insider Status

In addition, the Ninth Circuit's published opinion creates a circuit split regarding the proper test to determine non-statutory insider status. The test created by the Panel majority for determining non-statutory insider status directly conflicts with the test applied by the Third and Tenth Circuit Courts of Appeal. Under the Panel majority's new test, the courts must look to (1) "the closeness of the relationship with the debtor **that is comparable to that of the enumerated insider classifications in § 101(31),**" and (2) whether "the relevant transaction is negotiated at less than arm's length." *Village at Lakeridge*, 814 F.3d at 1001 (emphasis added) (citing *Winstar*, 554 F.3d at 395 and *U.S. Med.*, 531 F.3d at 1277); *see also In re Evergreen Energy, Inc.*, 546 B.R. 549, 553-54 (Bankr. D. Del. 2016) (same) (citing *Winstar*, 554 F.3d at 395-97 and legislative history); (App., Ex. A., pp. 13a-14a).

The Panel majority's focus on just a few factors such as control, cohabitation, payment of expenses, and the purchase of expensive gifts because it believed that only those factors are "comparable to . . . the enumerated insider classifications" is inconsistent with other circuit authority. Both the Third and Tenth Circuit decisions upon which the Panel majority relies rejected the "functional equivalent" test for

determining non-statutory insider status. The Third Circuit held that while "actual control (or its close equivalent) is necessary for a person or entity to constitute an insider under § 101(31)'s 'person in control language' . . .[,] a finding of control is not necessary for an entity to be a non-statutory insider." *Winstar*, 554 F.3d at 395-96 (citing *U.S. Med*, 531 F.3d at 1279). As the Third Circuit observed: "To hold otherwise would render meaningless Congress's decision to provide a non-exhaustive list of insiders . . . because the 'person in control' category would function as a determinative test." *Id.* at 396. **The appropriate question is "'whether there is a close relationship [between debtor and creditor] and . . . anything other than closeness to suggest that any transactions were not conducted at arm's length.'"** *Id.* (emphasis added) (quoting *U.S. Med.*, 531 F.3d at 1277). Accordingly, "a creditor may only be [adjudicated to be] a non-statutory insider of a debtor when the creditor's transaction of business with the debtor is not at arm's length . . . ." *U.S. Med.*, 531 F.3d at 1280; *Winstar*, 554 F.3d at 396-97. *See also Weinman v. Walker (In re Adam Aircraft Indus., Inc.)*, 805 F.3d 888, 894 (10th Cir. 2015) (noting that "someone not specifically listed in the statute can be considered an insider if he or she 'ha[s] a "sufficiently close relationship with the debtor that ... conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor."" (citing *U.S. Med.*, 531 F.3d at 1276) (quoting *Rupp v. United Sec. Bank (In re Kunz)*, 489 F.3d 1072, 1078–79 (10th Cir. 2007) (alterations in original)). As the Tenth Circuit noted in *Adam Aircraft*, "[w]e traditionally refer to these two categories—those specifically listed in the statute and those not specifically mentioned whose relationship still merits a closer level of scrutiny—as, respectively

(and indeed intuitively), statutory and non-statutory insiders." *Adams Aircraft*, 805 F.3d at 894. The "arm's length" test is fully consistent with the statute's legislative history. *Accord* H.R. REP. NO. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6269, 1977 WL 9628; S. REP. NO. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N 5787, 5810, 1978 WL 8531.

Although the Seventh Circuit has held that statutory definition of insider "has been expanded by bankruptcy courts to include positions analogous to those enumerated, including in the LLC context", *Longview Aluminum*, 657 F.3d at 509 (citations omitted), this test does not apply to non-statutory insiders. As the Seventh Circuit noted:

> . . . If the alleged insider holds a position substantially similar to the position specified in the definition [of 11 U.S.C. § 101(31)], a court will often find that individual to be an insider. **But based on the legislative history of the statute, our case law has also held that the term insider can also encompass anyone with a "sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor."**

Id. (Emphasis added).

Here, the Panel majority erroneously narrowed the arm's length test for determining non-statutory insider status by imposing an additional requirement that the relationship must be the functional equivalent of a statutory insider. The Panel's deference to the Bankruptcy Court's findings improperly ignored the "arm's length" test employed

by other circuits, and gave short shrift to the many cases holding that close friends and lovers, golfing buddies, business associates, former spouses, and others may be non-statutory insiders.[5] Had the Panel majority applied a *de novo* standard of review, it would have reversed.

As discussed above, the circuit split created by the Ninth Circuit's decision has national importance in bankruptcy law, and will have far reaching effect not only for future plan confirmation fights, but in many

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[5] *See, e.g., Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1011-12 (5th Cir. 1992) (former spouse and friend was a non-statutory insider for preference purposes); *Kaisha v. Dodson*, 423 B.R. 888, 901 (N.D. Cal. 2010) (woman with whom debtor was romantically involved prior to stock transfer was an insider even though they were not together at time of the transfer); *In re A. Tarricone, Inc.*, 286 B.R. 256 (Bankr. S.D.N.Y. 2002) ("golfing budd[y]" and close personal friend found to be insider); *In re Demko*, 264 B.R. 404, 408 (Bankr. W.D. Pa. 2001) (cohabitation by two people may render individual an insider); *In re McIver*, 177 B.R. 366 (Bankr. N.D. Fla. 1995) (live-in girlfriend may be an insider); *In re Curry*, 160 B.R. 813 (Bankr. D. Minn. 1993) (very close friend and business associate was insider for purposes of fraudulent conveyance liability); *In re Standard Stores, Inc.*, 124 B.R. 318, 325 (Bankr. C.D. Cal. 1991) (corporate debtor's president's ex-brother-in-law was a non-statutory insider for preference purposes); *In re O'Connell*, 119 B.R. 311, 316 (Bankr. N.D. Fla. 1990) ("very good friends" who made informal loans to debtor were insiders); *Castellani v. Kohne (In re Kurcharek)*, 79 B.R. 393 (E.D. Wis. 1987) (close friend found to be an insider).

areas of bankruptcy law including fraudulent conveyance and preferential transfer litigation under §§ 547, 548, and 550, objections to discharge under § 727, equitable subordination, and even insider transactions subject to the UFTA and UVTA, §§ 4(b) and 5(b), where cases frequently turn on whether a creditor or transferee is an insider.

The new test employed by the Panel majority makes it more difficult to establish non-statutory insider status unless the individual is the functional equivalent of a statutory insider. Because the Ninth Circuit reviewed the Bankruptcy Court's non-statutory insider determination for clear error, it limited the non-statutory insider inquiry to just a few factors applied by the Bankruptcy Court rather than applying the well-recognized, "arm's length" test.

Absent this Court's resolution of this issue, courts in the Ninth Circuit will no longer be able to find non-statutory insider status based on the arm's length nature of the transaction unless they also find that the relationship is the functional equivalent of a statutory insider. This circuit split will encourage forum shopping and lead to more litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: June 13, 2016

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Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 8, 2016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-60038, No. 13-60039

IN RE THE VILLAGE AT LAKERIDGE, LLC,
FKA MAGNOLIA VILLAGE, LLC,

Debtor,

U.S. BANK N.A., TRUSTEE, *ET AL.*, BY
AND THROUGH CWCAPITAL ASSET
MANAGEMENT LLC, SOLELY IN ITS
CAPACITY AS SPECIAL SERVICER,

Appellant,

v.

THE VILLAGE AT LAKERIDGE, LLC,

Appellee,

ROBERT ALAN RABKIN,

Real Party in Interest.

Argued and Submitted October 22, 2015
Filed February 8, 2016

Appendix A

Before: Richard R. Clifton and N. Randy Smith, Circuit Judges, and Robert S. Lasnik,* Senior District Judge.

Opinion by Judge N.R. Smith; Partial Concurrence and Partial Dissent by Judge Clifton.

OPINION

N.R. SMITH, Circuit Judge:

Before a bankruptcy court may confirm a reorganization plan in a Chapter 11 bankruptcy, it must determine if any of the persons voting to accept the plan are insiders.[1] Insiders are either statutory or non-statutory. To be a "statutory insider," a creditor *must* fall within one of the categories listed in 11 U.S.C. § 101(31). A creditor does not become an insider simply by receiving a claim from a statutory insider. To be a non-statutory insider, the creditor must have a close relationship with the debtor and negotiate the relevant transaction at less than arm's length. Thus, Dr. Robert Rabkin does not qualify as a statutory or non-statutory insider.[2]

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* The Honorable Robert S. Lasnik, Senior District Judge for the U.S. District Court for the Western District of Washington, sitting by designation.

1. 11 U.S.C. § 1129(a)(10) ("The court shall confirm a plan only if all of the following requirements are met: . . . If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.").

2. In this opinion, we address only Rabkin's statutory and non-statutory insider status. We resolve the remaining claims in a memorandum disposition filed concurrently with this opinion.

Appendix A

I. Factual Proceedings

A. The Parties

The debtor, Village at Lakeridge, LLC ("Lakeridge"), has only one member: MBP Equity Partners 1, LLC ("MBP"). MBP is managed by a board of five members, one of whom is Kathie Bartlett.[3] Bartlett shares a close business and personal relationship with Rabkin, which is unrelated to Bartlett's position with MBP.

U.S. Bank National Association ("U.S. Bank") is successor trustee to Greenwich Financial Products, Inc., the company through which Lakeridge financed a property purchase. At the time Lakeridge filed for bankruptcy, U.S. Bank was one of two creditors holding a claim on Lakeridge's assets. U.S. Bank held a fully secured claim worth about $10 million, and MBP held an unsecured claim worth $2.76 million.

B. Bankruptcy Court Proceedings

Lakeridge filed for Chapter 11 relief on June 16, 2011. On September 14, Lakeridge filed a Disclosure Statement and an initial Plan of Reorganization. Shortly thereafter, MBP's board decided to sell MBP's unsecured

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3. Although Bartlett signed Lakeridge's bankruptcy petition and all related documents on behalf of Lakeridge, she testified that she did not have authority to make decisions for MBP—or Lakeridge—on her own.

claim.[4] Bartlett, on behalf of MBP's board, approached Rabkin with an offer to sell the claim. On October 27, Rabkin purchased the claim for $5,000. In its Disclosure Statement, Lakeridge classified Rabkin's claim as a "Class 3 general unsecured claim."

On June 7, 2012, U.S. Bank deposed Rabkin, questioning him about his relationship with Lakeridge, MBP, and Bartlett. In his testimony, Rabkin indicated he had little knowledge of, and no relationship with, Lakeridge or MBP before he acquired MBP's claim. However, Rabkin testified that he had a close relationship with Bartlett, that he saw her regularly, including the day of the deposition, and that he had attended a meeting with his counsel and Lakeridge's counsel one hour before the deposition. Rabkin testified that he purchased MBP's unsecured claim as a business investment, that he had not known how much his claim was worth before the deposition, and that he knew the claim was a risky investment. Rabkin further testified that, prior to the deposition, he had not known his distribution under the proposed reorganization plan was $30,000. Rabkin claimed to have no interest in Lakeridge other than receiving a return on his investment.

U.S. Bank, through counsel, offered to purchase Rabkin's claim for $50,000 at the deposition. Rabkin said he would consider the offer. U.S. Bank, in an attempt to compel an immediate answer, increased its offer to

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4. Bartlett testified that MBP's board decided to sell its claim for two reasons: (1) the claim was useless to MBP because it could not vote the claim in favor of its reorganization plan; and (2) the board believed there "may be a tax advantage in selling [the] claim."

$60,000. Rabkin again agreed to consider the offer, refusing to provide an answer on the spot. After Rabkin consulted with counsel, he did not respond to the offer. The offer lapsed. At a hearing on August 29, 2012, Rabkin stated he had felt pressured to accept U.S. Bank's cash offer while he was under oath, without having time to review it first.[5]

On July 1, 2012, U.S. Bank moved to designate Rabkin's claim and disallow it for plan voting purposes ("Designation Motion"). U.S. Bank contended Rabkin was both a statutory and non-statutory insider, and that the assignment to Rabkin was made in bad faith. The bankruptcy court held an evidentiary hearing on the Designation Motion on August 1, 2012. In its subsequent order ("Designation Order"), the court held Rabkin was not a non-statutory insider, because:

> (a) Dr. Rabkin does not exercise control over [Lakeridge;] (b) Dr. Rabkin does not cohabitate with Ms. Bartlett, and does not pay [her] bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett; (d) Ms. Bartlett does not exercise control over Dr. Rabkin[;] (e) Ms. Bartlett does not pay [Dr.] Rabkin's bills or living expenses; and (f) Ms.

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5. The district court judge explained that he "underst[ood] the doctor or many people would have been put off by [U.S. Bank's approach to acquiring Rabkin's claim] and [he didn't] think it[was] at all surprising that [Rabkin] would reject it and not really be interested in dealing with the people who made the offer to him thereafter."

Bartlett has never purchased expensive gifts for Dr. Rabkin.

The court also held that Rabkin did not purchase MBP's claim in bad faith. However, the court designated Rabkin's claim and disallowed it for plan voting, because it determined Rabkin had become a statutory insider by acquiring a claim from MBP. In other words, the bankruptcy court determined that, when a statutory insider sells or assigns a claim to a non-insider, the non-insider becomes a statutory insider as a matter of law.

Lakeridge and Rabkin both timely appealed the Designation Order, challenging the court's finding that Rabkin was a statutory insider for purposes of plan voting. U.S. Bank cross-appealed, challenging the findings that Rabkin was not a non-statutory insider and had not purchased MBP's claim in bad faith.

C. Bankruptcy Appellate Panel

The United States Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") affirmed in part, reversed in part, and vacated in part the Designation Order. The BAP reversed the finding that Rabkin had become a statutory insider as a matter of law by acquiring MBP's claim and affirmed the findings that Rabkin was not a non-statutory insider and that the claim assignment was not made in bad faith.[6] The BAP held that insider status cannot be

6. The question of bad faith is addressed in the memorandum disposition filed concurrently with this opinion and will not be addressed here.

assigned and must be determined for each individual "on a case-by-case basis, after the consideration of various factors." Finally, the BAP held Rabkin could vote to accept the Lakeridge plan under 11 U.S.C. § 1129(a)(10), because he was an impaired creditor who was not an insider. U.S. Bank appealed. We have jurisdiction under 28 U.S.C. § 158(d),[7] and we affirm.

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7. Under 28 U.S.C. § 158(d), we "have jurisdiction of appeals from all final decisions, judgments, orders, and decrees" of the BAP. A decision is considered "final and . . . appealable where it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." *Dye v. Brown (In re AFI Holding, Inc.)*, 530 F.3d 832, 836 (9th Cir. 2008) (quoting *Schulman v. California (In re Lazar)*, 237 F.3d 967, 985 (9th Cir. 2001)). When the BAP "affirms or reverses a bankruptcy court's final order," the BAP's order is also final. *Vylene Enters., Inc. v. Naugles, Inc. (In re Vylene Enters., Inc.)*, 968 F.2d 887, 895 (9th Cir. 1992). However, if the BAP "remands for factual determinations on a central issue, its order is not final and we lack jurisdiction to review the order." *Id.*

> The bankruptcy court issued two orders: (1) the Designation Order (finding that Rabkin was not a non-statutory insider and had not acted in bad faith, but nevertheless designating his claim and disallowing it for plan voting purposes because he had acquired the claim from a statutory insider) and (2) the Discovery Order (denying U.S. Bank's Discovery Motions). Both bankruptcy court orders "finally determine[d]" Rabkin's right to vote on Lakeridge's reorganization plan and were therefore final orders. *See In re AFI Holding, Inc.*, 530 F.3d at 836.
>
> However, the BAP's decision as issued was not final, because, although it affirmed and reversed portions of the bankruptcy court orders, it also remanded for discovery to allow factual determinations central to

II. Standard of Review

We review the bankruptcy court's decision independent of the BAP's decision. *See Boyajian v. New Falls Corp. (In re Boyajian)*, 564 F.3d 1088, 1090 (9th Cir. 2009). Whether an insider's status transfers when he sells or assigns the claim to a third party presents a question of law. *Miller Ave. Prof'l & Promotional Servs., Inc. v. Brady (In re Enter. Acquisition Partners)*, 319 B.R. 626, 630 (B.A.P. 9th Cir. 2004). Establishing the definition of non-statutory insider status is likewise a purely legal inquiry. We review questions of law de novo. *Stahl v. Simon (In re Adamson Apparel)*, 785 F.3d 1285, 1289 (9th Cir. 2015).

Whether a specific person qualifies as a non-statutory insider is a question of fact. *Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman)*, 126 B.R. 63, 70 (B.A.P. 9th Cir. 1991), *overruled on other grounds by Zachary v. Cal. Bank & Tr.*, No. 13-16402, 811 F.3d 1191, 2016 U.S. App. LEXIS 1368 (9th Cir. Jan. 28, 2016). We review factual findings for clear error. *In re Adamson Apparel*, 785 F.3d at 1289.

Rabkin's non-statutory insider status and ability to vote on Lakeridge's reorganization plan.

To make the BAP's decision final, U.S. Bank withdrew its arguments concerning the Discovery Order at oral argument, removing the need for remand. Because U.S. Bank withdrew its appeal concerning the Discovery Order, we will not discuss it in this opinion. Nor may U.S. Bank seek to enforce the BAP's holding on that issue at the bankruptcy court level.

III. Discussion

"An insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms [*sic*] length with the debtor." S. Rep. No. 95-989, at 25 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5810; H.R. Rep. No. 95-595, at 312 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6269. We recognize two types of insiders: statutory insiders and non-statutory insiders. Statutory insiders, also known as "per se insiders," are persons explicitly described in 11 U.S.C. § 101(31), such as "person[s] in control of the debtor." § 101(31). As a matter of law, a statutory insider has a sufficiently close relationship with a debtor to warrant special treatment. *In re Enter. Acquisition Partners*, 319 B.R. at 631. No one suggests Rabkin qualifies as a statutory insider in his own right.

A non-statutory insider is a person who is not explicitly listed in § 101(31), but who has a sufficiently close relationship with the debtor to fall within the definition. *See Schubert v. Lucent Techs. Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 395 (3d Cir. 2009) ("[I]n light of Congress's use of the term 'includes' in § 101(31), courts have identified a category of creditors, sometimes called 'non-statutory insiders,' who fall within the definition but outside of any of the enumerated categories."); *see also* § 101(31) (stating that "[t]he term 'insider' *includes*" the listed categories (emphasis added)); § 102(3) (explaining that "includes" is "not limiting").

A. Statutory Insider Status

U.S. Bank asserts that Rabkin became a statutory insider when he acquired a claim from MBP. We disagree. A person does not become a statutory insider solely by acquiring a claim from a statutory insider for two reasons. First, bankruptcy law distinguishes between the status of a claim and that of a claimant. Insider status pertains only to the claimant; it is not a property of a claim. Because insider status is not a property of a claim, general assignment law—in which an assignee takes a claim subject to any benefits and defects of the claim—does not apply. Second, a person's insider status is a question of fact that must be determined after the claim transfer occurs. *See Concord Square Apartments of Wood Cty., Ltd. v. Ottawa Props., Inc. (In re Concord Square Apartments)*, 174 B.R. 71, 75 (Bankr. S.D. Ohio 1994). This determination does not ignore the public policy behind protecting secured creditors' interests in bankruptcy cases, as explained below.

The term "insider," as used in the bankruptcy code, is a noun, referring to a person (as defined at § 101(41)). *See, e.g.*, § 101(31) (defining "insider" as a person with a particular relationship with the debtor); *see also* § 1129(a)(10) (explaining that a court can cram down a reorganization plan when at least one class of impaired claims has voted to accept the plan, not including "any acceptance of the plan by an insider"). The term "insider" is not, as U.S. Bank argues, an adjective used to describe the property of a claim.[8]

8. If U.S. Bank's argument were true, we would expect to find references to "the holder of an insider claim" rather than "an insider" in the bankruptcy code.

Appendix A

Whether a creditor is an insider is a factual inquiry that must be conducted on a case-by-case basis. *See, e.g., In re Friedman*, 126 B.R. at 67, 70-71 (describing in detail the alleged insiders' relationships with the debtor); *Miller v. Schuman (In re Schuman)*, 81 B.R. 583, 586-87 (B.A.P. 9th Cir. 1987) (per curiam) (analyzing facts to determine whether the debtor and alleged insider had a sufficiently close relationship to warrant finding insider status). Courts may not bypass this intensive factual analysis by finding that a third party became an insider as a matter of law when he acquired a claim from an insider. If so, a third-party assignee could be foreclosed from voting a claim acquired from an insider, even if the entire transaction was conducted at arm's length. The bankruptcy code did not intend this result.

Further, if a third party could become an insider as a matter of law by acquiring a claim from an insider, bankruptcy law would contain a procedural inconsistency wherein a claim would *retain* its insider status when assigned from an insider to a non-insider, but would *drop* its non-insider status when assigned from a non-insider to an insider. *See In re Applegate Prop., Ltd.*, 133 B.R. 827, 833 (Bankr. W.D. Tex. 1991) (holding that an insider of a Chapter 11 debtor may never vote a claim toward plan confirmation, even if the insider acquired the claim from a non-insider); *In re Holly Knoll Partnership*, 167 B.R. 381, 385 (Bankr. E.D. Pa. 1994) (same).

Section 1129 of Title 11 contains a number of safeguards for secured creditors who could be negatively impacted by a debtor's reorganization plan. A court may confirm a plan only if, among other requirements: (1) the plan and plan proponent comply with the bankruptcy

code; (2) the plan is proposed in good faith; (3) the plan proponent has disclosed the identity of all insiders and potential insiders; (4) at least one class of impaired claims has accepted the plan (and no insider can vote); and (5) the plan "is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." § 1129. In addition, a court "may designate any entity whose acceptance or rejection of [a] plan was not in good faith, or was not solicited or procured in good faith." § 1126(e). Therefore, U.S. Bank overstates its argument that, unless we reverse the BAP, debtors will begin assigning their claims to third parties in return for votes in favor of plan confirmation.[9] We fail to see how establishing a rule that insider status transfers as a matter of law would better protect the creditors' rights than the current factual inquiry.[10]

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9. For this assertion, U.S. Bank cites *In re Heights Ban Corp.*, 89 B.R. 795 (Bankr. S.D. Iowa 1988). There, the court concluded insider status must transfer with a claim upon assignment, otherwise "the operation of section 1129(a) would be seriously undermined. Debtors unable to obtain the acceptance of an impaired creditor simply could assign insider claims to third parties, who in turn could vote to accept." *Id.* at 799. Although the language in that case supports U.S. Bank's position, the facts do not. The assignor in *In re Heights Ban Corp.* transferred more than his claim; he and his co-shareholders also transferred their shareholder interests in the debtor to the assignee. *Id.* The court concluded that the assignors' and assignee's interests were "so interlocked . . . [as to be] indistinguishable with respect to the debtor for purposes of section 1129(a)(10)." *Id.* Thus, the assignee became an insider by becoming a shareholder of the debtor, not simply by acquiring a claim from a statutory insider.

10. U.S. Bank correctly points out that this court previously determined insider status does transfer with a claim under the

In conducting a factual inquiry for insider status, courts should begin with the statute. If the assignee fits within a statutory insider classification on his own, the court's review ends; it need not examine the nature of the statutory insider's relationship to the debtor. *See In re Enter. Acquisition Partners*, 319 B.R. at 631. Because Rabkin did not become a statutory insider by way of assignment and was not a statutory insider in his own capacity, we must determine whether the bankruptcy court erred in finding that Rabkin was not a non-statutory insider.

B. Non-Statutory Insider Status

Non-statutory insiders are the functional equivalent of statutory insiders and, therefore, must fall within the ambit of § 101(31). *See In re Winstar Commc'ns, Inc.*, 554 F.3d at 395. A creditor is not a non-statutory insider unless: (1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in § 101(31), and (2) the relevant transaction is negotiated at less than arm's length.[11] *See Anstine v.*

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general law of assignment. *See Wake Forest v. Transamerica Title Ins. Co. (In re Greer W. Inv. Ltd. Pshp)*, No. 94-15670, 1996 U.S. App. LEXIS 8495, 1996 WL 134293 (9th Cir. Mar. 25, 1996) (unpublished). However, Ninth Circuit Rule 36-3 prohibits parties from citing "[u] npublished dispositions . . . of this Court issued before January 1, 2007 . . . to the courts of this circuit." Thus, U.S. Bank should not have relied upon, or cited, *In re Greer West* in its arguments, and we are not bound by the decision.

11. An "arm's length transaction" is: "1. A transaction between two unrelated and unaffiliated parties. 2. A transaction between

Carl Zeiss Meditec AG (In re U.S. Med., Inc.), 531 F.3d 1272, 1277 (10th Cir. 2008). A court cannot assign non-statutory insider status to a creditor simply because it finds the creditor and debtor share a close relationship. *See id.* at 1277-78.

A court must conduct a fact-intensive analysis to determine if a creditor and debtor shared a close relationship and negotiated at less than arm's length. Having—or being subject to—some degree of control is one of many indications that a creditor may be a non-statutory insider, but actual control is not required to find non-statutory insider status.[12] *See id.* at 1277 n.5. Likewise, access to the debtor's inside information may—but not shall—warrant a finding of non-statutory insider status. *See id.* at 1277.

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two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises." *Transaction, Black's Law Dictionary* (10th ed. 2014). The dissent quotes both definitions, but interprets them to mean that *any* affinity between two parties renders a transaction less than arm's length rather than returning to the definition in § 101(31) for guidance. *See* Dissent at 23.

12. As noted by the Tenth and Third Circuits, if actual control were required for non-statutory insider status, all non-statutory insiders would also be statutory insiders under 11 U.S.C. § 101(31). § 101(31)(A)(iv) (defining "insider" as a "corporation of which the debtor is a director, officer, or *person in control*" (emphasis added)); § 101(31)(B)(iii), (C)(v) (defining "insider" as a "person in control of the debtor"); *In re Winstar Commc'ns, Inc.*, 554 F.3d at 396; *In re U.S. Med., Inc.*, 531 F.3d at 1279. Such construction of § 101(31) would render meaningless the language: "the term 'insider' *includes*."

U.S. Bank asserts the bankruptcy court erred in holding Rabkin was not a non-statutory insider. We review the bankruptcy court's factual finding for clear error.[13] *In re Friedman*, 126 B.R. at 70; Fed. R. Civ. P. 52(a)(6). "A finding is 'clearly erroneous' when[,] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948). We apply this highly deferential standard to findings of fact, because "[f]indings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations." *Rand v. Rowland*, 154 F.3d 952, 957 n.4 (9th Cir. 1998) (en banc); *see also* Fed. R. Civ. P. 52(a)(6) ("[T]he reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."). Therefore, so long as the bankruptcy court's findings are "plausible in light of the record viewed in its entirety," we cannot reverse even if we "would have weighed the evidence differently." *Anderson v. City of Bessemer*, 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

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13. The dissent argues that "Rabkin's status [is] a mixed question of law and fact, subject to de novo review." Dissent at 25. Stating that an issue is a "mixed question" is simply the dissent's backdoor to reassessing the facts. As stated in Section II, we have two distinct issues in question, each with a different standard of review. First, we reviewed de novo the bankruptcy court's definition of non-statutory insider status, which is a purely legal question. Now, we must analyze whether the facts of this case are such that Rabkin met that definition, which is a purely factual inquiry and properly left to clear error review.

The bankruptcy court's finding that Rabkin does not qualify as a non-statutory insider is not clearly erroneous.[14] U.S. Bank presents no evidence that Rabkin had a relationship with Lakeridge comparable to those listed in § 101(31). Rather, the evidence shows Rabkin had little knowledge of Lakeridge—or its sole member MBP—prior to acquiring MBP's unsecured claim, much less access to inside information. Rabkin does not control MBP or Lakeridge, nor does Lakeridge or MBP have any control over Rabkin. U.S. Bank has shown that Rabkin had a close personal and business relationship with Bartlett, and that Bartlett approached Rabkin, and only Rabkin, with an offer to sell MBP's claim. However, Bartlett does not control MBP or Lakeridge. Rather, Bartlett was one of MBP's five managing members, all of whom discussed potential buyers and agreed to offer the claim to Rabkin. Rabkin did not know, and had no relationship with, the remaining four managing members of MBP.

U.S. Bank has not shown that Rabkin's relationship with Bartlett—who is indisputably a statutory insider of MBP and Lakeridge—is sufficiently close to compare with any category listed in § 101(31). Rabkin had no control over Bartlett, and Bartlett had no control over Rabkin. Rabkin and Bartlett kept separate finances, lived separately, and conducted business separately. The bankruptcy court

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14. The dissent explains how it would have decided this case had it been sitting as the bankruptcy court judge. However, it was not the bankruptcy court judge. The dissent did not preside over the evidentiary hearing and did not hear the evidence in person. This court cannot substitute its judgment for that of the bankruptcy court "simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573.

properly evaluated these factors to determine whether Rabkin's relationship with Bartlett was close enough to make him an insider who was conducting business at less than arm's length with MBP.[15] Nothing in § 101(31) or case law indicates it would be improper for a debtor to sell, or even give, a claim to a friend if the friend is acting of his own volition and neither party is engaged in bad faith. *See In re Friedman*, 126 B.R. at 70 ("The case law that has developed . . . indicates that not every creditor-debtor relationship attended by a degree of personal interaction between the parties rises to the level of an insider relationship.").

Both Rabkin and Bartlett testified that, although Rabkin knew Lakeridge was in bankruptcy and that purchasing the claim was a risky investment, when Rabkin purchased the claim he did not know about Lakeridge's plan of reorganization or that his vote would be required to confirm it. Although Rabkin did not conduct an extensive inquiry into the claim's value prior to purchasing it, Rabkin explained that it was a small investment upon which Bartlett had indicated he could make a profit and "due diligence would have been very expensive."[16]

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15. The dissent asserts that the bankruptcy court applied the wrong legal standard because it did not state the words "arm's length transaction" in its final order. Dissent at 25. The court's failure to use the words "arm's length transaction" is irrelevant. The court's entire explanation is a description of why the transaction was conducted at arm's length and, hence, why Rabkin was not an insider. The court should not be discredited for listing the specific facts that made the transaction arm's length rather than merely stating a conclusion.

16. The dissent argues that "the only logical explanation for Rabkin's actions" is that "[h]e did a favor for a friend." Dissent at 23.

Although Rabkin allowed U.S. Bank's offer to purchase the claim for $50,000 to lapse and subsequently voted in favor of Lakeridge's reorganization plan, he did so on the understanding that Lakeridge would amend the reorganization plan to increase his payout to an amount comparable to that offered by U.S. Bank.

These facts do not leave us with a "definite and firm conviction that a mistake has been committed." *See U.S. Gypsum Co.*, 333 U.S. at 395. Rather, the bankruptcy court's finding that, on the record presented, Rabkin was not a non-statutory insider is entirely plausible, and we cannot reverse even if we may "have weighed the evidence differently." *See Anderson*, 470 U.S. at 574.

IV. Conclusion

The BAP properly reversed the bankruptcy court's holding as to Rabkin's statutory insider status and affirmed the bankruptcy court's holding as to Rabkin's non-statutory insider status. Because Rabkin is neither a statutory nor non-statutory insider, the BAP properly reversed the portion of the bankruptcy court's order that excluded Rabkin's vote for plan confirmation purposes. Therefore, the judgment of the BAP is **AFFIRMED**.

However, the bankruptcy court's explanation that Rabkin made a speculative investment at a relatively low cost and with the potential for a big payoff is equally logical.

CLIFTON, Circuit Judge, concurring in part and dissenting in part:

I agree with the legal conclusion that a person does not necessarily become a statutory insider solely by acquiring a claim from a statutory insider, as discussed in section III.A of the majority opinion. As long as the interest previously owned by a statutory insider was acquired by an independent party, for bona fide reasons, uninfected with the unique motivations of the insider, there is no reason that the insider taint should always be unshakeable. The consideration of whether the insider status should stick to the interest properly depends on the particular circumstances and is appropriately treated as something to be determined based on the facts of the situation. But it is clear to me, based on the facts of this case, that Robert Rabkin should be viewed as a non-statutory insider, and the bankruptcy court should treat his claim as such. I respectfully dissent as to Section III.B.

The majority opinion, at 15-16, defines a creditor as a non-statutory insider when "(1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in § 101(31), and (2) the relevant transaction is negotiated at less than arm's length." I agree.

The facts make it clear that this transaction was negotiated at less than arm's length. Rabkin paid $5,000 to MBP (the sole member of the debtor, Lakeridge), for an unsecured claim against Lakeridge nominally worth $2.76 million. MBP did not offer the interest to anyone

else. The purchase was not solicited by Rabkin. It was proposed to Rabkin by Kathie Bartlett, a member of the MBP board. There was no evidence of any negotiation over price — Rabkin didn't offer less, and MBP didn't ask for more. Rabkin knew little if anything about Lakeridge (or, for that matter, MBP) before he bought the claim, nor did he conduct any investigation to ascertain the current value of that unsecured claim. Even after he purchased the claim, he did not bother to find out more about what it might be worth. Prior to his deposition Rabkin did not even know what the proposed plan of reorganization would pay him for the claim. After he learned that the payment under the plan would be $30,000, he was offered as much as $60,000 for his interest, but he declined that offer.[1]

The motives of MBP and Bartlett are clear and not denied. MBP is the sole member of Lakeridge. The Lakeridge reorganization plan cannot be approved unless there is a class of creditors willing to vote to approve it. Without the sale of this claim to Rabkin and his anticipated vote to approve the plan, that plan is dead in the water, Lakeridge will be liquidated, and there will be no hope for MBP to obtain anything for either the unsecured claim or,

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1. The offer was made in a crude manner at Rabkin's deposition by the attorney for U.S. Bank. The manner in which the offer was presented and the demand for an immediate response weighs against putting much weight on Rabkin's rejection of the offer. Even after reflection and consultation with his counsel, however, Rabkin declined the offer and did nothing to pursue any opportunity to realize more than $30,000 for his interest. That behavior does not support the view that his motivations were purely economic or that his decision-making was that of a party acting at arm's length without regard for his personal relationship with an insider.

more importantly, its ownership of Lakeridge. It may have wanted to recover something from its unsecured claim, but it did not look for the best possible price because its Lakeridge ownership was far more important. MBP was primarily motivated to place the unsecured claim in the hands of a friendly creditor who could be counted on to vote in favor of the reorganization plan, opening the door to the possibility of obtaining approval of the proposed plan of reorganization.

Rabkin's motivation is a bit murkier, but it is clear that the transaction cannot be understood as a primarily economic proposition on his part. There was no evidence that he had a habit of making blind bets, say by helping out Nigerian princes or buying the Brooklyn Bridge. There is an alternative explanation that makes a lot more sense. As the majority opinion acknowledges, at 6, Rabkin had a "close business and personal relationship" with Bartlett, the person who proposed this transaction to him. I don't have to know the precise details of the relationship between Rabkin and Bartlett to conclude that it offers the only logical explanation for Rabkin's actions here. He did a favor for a friend, and if it made some money for himself, so much the better.

Rabkin may not have been setting out to lose money or planning simply to give $5,000 to Bartlett, but that is not the standard. *Black's Law Dictionary* (10th ed. 2014) defines "arm's length transaction" as follows:

> 1. A transaction between two unrelated and unaffiliated parties. 2. A transaction between

> two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises.

Rabkin and Bartlett were not "unrelated and unaffiliated parties." The transaction was not conducted "as if the parties were strangers." It was not an arm's length transaction. As a result, under the definition recognized by the majority, Rabkin was a "non-statutory insider" because "the relevant transaction [was] negotiated at less than arm's length."

Rabkin at no point attempted to negotiate the price of his purchase, research the value of the claim that was offered to him, or otherwise behave in a manner that suggests that he took his acquisition seriously as an economic investment. This "compels the conclusion" that Rabkin and Bartlett's relationship was "close enough to gain an advantage attributable simply to affinity rather than to the course of dealings between the parties." *In re Kunz*, 489 F.3d 1072, 1079 (10th Cir. 2007) (quoting *In re Enter. Acquisition Partners, Inc.*, 319 B.R. 626, 631 (B.A.P. 9th Cir. 2004)); *see also, Matter of Holloway*, 955 F.2d 1008, 1011 (5th Cir. 1992).

Moreover, though the majority opinion treats the bankruptcy court's determination that Rabkin was not a non-statutory insider as a factual finding subject to review only for clear error, I do not think that reflects a correct understanding of what the bankruptcy court decided. The specific facts of the episode were not seriously contested. Rather, the majority simply accedes to the bottom-line

adjudication that, based on those facts, Rabkin was not an insider.

But that finding turns at least as much on the legal standard that defines a non-statutory insider as it does on the facts. Look at what the bankruptcy court said in explaining its conclusion that Rabkin was not a non-statutory insider, quoted by the majority opinion, at 8:

> (a) Dr. Rabkin does not exercise control over [Lakeridge;] (b) Dr. Rabkin does not cohabitate with Ms. Bartlett, and does not pay [her] bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett; (d) Ms. Bartlett does not exercise control over Dr. Rabkin[;] (e) Ms. Bartlett does not pay [Dr.] Rabkin's bills or living expenses; and (f) Ms. Bartlett has never purchased expensive gifts for Dr. Rabkin.

This list of facts would support a finding that Rabkin and Bartlett are separate financial entities, but it does not show that this transaction was conducted as if they were strangers. At no point does the bankruptcy court mention or refer to an "arm's length transaction" at all, let alone provide a sufficient basis for a finding that Rabkin and Bartlett were unrelated or dealt with each other as strangers. That is the standard the majority opinion and I both agree should apply, but it was not the standard actually applied by the bankruptcy court. The majority disagrees, stating, at 19 n.15, that the bankruptcy court's order "is a description of why the transaction was

conducted at arm's length," but the majority opinion is conspicuously silent in explaining how the facts actually justify any such finding.

That tells me that the problem here is not with the facts as found by the bankruptcy court but with the legal test that the bankruptcy court applied. What standard did the bankruptcy court apply to determine whether this transaction was conducted at arm's length, by parties acting like they were strangers? We don't know, because the bankruptcy court order never discussed the concept. At a minimum, this makes Rabkin's status a mixed question of law and fact, subject to de novo review. *See In re Bammer*, 131 F.3d 788, 792 (9th Cir. 1997) ("Mixed questions presumptively are reviewed by us de novo because they require consideration of legal concepts and the exercise of judgment about the values that animate legal principles.").

I do not need to pursue that question further here, though, because even if the clear error standard applies, the finding that Rabkin was not a non-statutory insider cannot survive scrutiny. The majority opinion states three separate times, at 17, 18 n.14 & 20, that we cannot reverse under the clear error standard simply because we would have decided the case differently, a telling sign that even the majority recognizes that support for the finding is thin at best. It even suggests, at 18 n.14, that this dissent presents nothing more than a statement of how I would have decided the case sitting as a bankruptcy judge. But my dissent is based on far more than a mere alternative view of the evidence. I cannot fathom how anyone could

reasonably conclude that this transaction was conducted as if Rabkin and Bartlett were strangers. The clear error standard is not supposed to provide carte blanche approval of whatever the bankruptcy court might have found. That is especially true here, where the bankruptcy court never actually stated a finding that the transaction was at arm's length or that the parties conducted the transaction as if they were strangers. Under the proper definition of "arm's length transaction," Rabkin's acquisition of the claim was a transaction "negotiated at less than arm's length." He was a non-statutory insider, and his claim should be treated as such.

The majority's holding also has the troubling effect of creating a clear path for debtors who want to avoid the limitations the Bankruptcy Act places on reorganization plans. The Act allows courts to confirm bankruptcy plans if each class of claims or interests impaired under the plan votes to accept the plan. 11 U.S.C. § 1129(a)(8). Perhaps recognizing that unanimous agreement on a given bankruptcy plan would sometimes prove impossible, Congress also created an exception to § 1129(a)(8) allowing debtors to "cram down" a bankruptcy plan over the objections of some debtor classes. The cramdown provision allows courts to approve a bankruptcy plan so long as all provisions of § 1129(a) are met except for § 1129(a)(8), and the proposed plan is fair, equitable, and does not discriminate unfairly. 11 U.S.C. § 1129(b)(1). Even in the case of a cramdown, though, "at least one class of claims that is impaired under the plan [must have] accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10).

The legislative history on § 1129 is sparse and provides little insight into Congress's motives,[2] but in accordance with one of the most basic tenets of statutory interpretation, we must "interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. United States EPA.*, 942 F.2d 1427, 1432 (9th Cir. 1991). Here, we are obligated to interpret § 1129 as a whole and in a way that gives each of its provisions meaning. A cramdown plan cannot be approved unless it is accepted by at least one class of impaired creditors.

Yet the majority opinion effectively renders that statutory requirement meaningless. Under the holding here, insiders are free to evade the requirement simply by transferring their interest for a nominal amount (perhaps a few peppercorns) to a friendly third party, who can then cast the vote the insider could not have cast itself.

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2. As the Fifth Circuit has noted, "the scant legislative history on § 1129(a)(10) provides virtually no insight as to the provision's intended role." *In re Vill. at Camp Bowie I, L.P.*, 710 F.3d 239, 246 (5th Cir. 2013) (citing National Bankruptcy Conference, *Reforming the Bankruptcy Code: The National Bankruptcy Conference's Code Review Project* 277 (1994) (noting that the legislative history of § 1129(a)(10) "is murky, shedding little light on its intended role"); Scott F. Norberg, *Debtor Incentives, Agency Costs, and Voting Theory in Chapter 11*, 46 U. Kan. L.Rev. 507, 538 (1998) (noting that "[t]he legislative history . . . sheds little light on the rationale for section 1129(a)(10)")).

Contrary to the majority's assurances, the requirement that all votes be cast in good faith is not a check on this behavior. In the memorandum disposition issued alongside this opinion, we conclude that Rabkin's vote for the plan was cast in good faith because Appellants had not proven that he had "ulterior motives" for his vote to approve the plan beyond personal enrichment. By this standard, a savvy debtor can comply with the good faith requirement by following a simple formula: develop a reorganization plan that would provide a payout on the insider claim if approved, and then sell the claim to a friendly third party for a price lower than the payout. This enables the debtor to maneuver the third party into a position where it would be foolish not to vote for approval of the reorganization plan, ensuring a "yes" vote and thereby allowing the debtor to effectively avoid the requirement under § 1129(a)(10) that at least one non-insider must approve the plan.

Congress cannot have intended this outcome. If it had, it would not have required that at least one class of impaired creditors — excluding insiders — vote for a plan before it can be approved. Our holding here effectively negates that part of the statute.

I respectfully dissent.

APPENDIX B — MEMORANDUM OF THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT, FILED APRIL 5, 2013

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

BAP Nos. NV-12-1456-PaKiTa,
NV-12-1474-PaKiTa (Cross-appeals)

Bk. No. 11-51994-BTB

In re:

THE VILLAGE AT LAKERIDGE, LLC,
FKA MAGNOLIA VILLAGE, LLC,

Debtor.

THE VILLAGE AT LAKERIDGE, LLC, FKA MAGNOLIA VILLAGE, LLC; ROBERT ALAN RABKIN, M.D.,

Appellants/Cross-appellees,

v.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, AS SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, N.A., AS SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE REGISTERED HOLDERS OF GREENWICH

Appendix B

CAPITAL COMMERCIAL FUNDING CORP., COMMERCIAL MORTGAGE TRUST 2005-GG3, COMMERCIAL MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2005-GG3, BY AND THROUGH, CWCAPITAL ASSET MANAGEMENT LLC, SOLELY IN ITS CAPACITY AS SPECIAL SERVICER,

Appellee/Cross-appellant.

March 22, 2013, Argued; April 5, 2013, Filed

Appeal from the United States Bankruptcy Court for the District of Nevada

Honorable Bruce T. Beesley, Bankruptcy Judge, Presiding

Before: PAPPAS, KIRSCHER and TAYLOR, Bankruptcy Judges.

MEMORANDUM[1]

Chapter 11[2] debtor The Village at Lakeridge, LLC ("Lakeridge") appeals the order of the bankruptcy

1. This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (*see* Fed. R. App. P. 32.1), it has no precedential value. *See* 9th Cir. BAP Rule 8013-1.

2. Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as Civil Rules.

court granting in part the motion of U.S. Bank National Association as Trustee[3] ("USB") to (A) designate claim of Robert Rabkin and (B) disallow such claim for plan voting purposes ("Designation Motion"). USB cross-appeals (1) the part of the order granting the Designation Motion holding that Dr. Robert Rabkin ("Rabkin") was not a non-statutory insider of Lakeridge and (2) an order denying requests to intervene in discovery disputes ("Discovery Requests"). We AFFIRM in part, REVERSE in part, and VACATE in part the order regarding the Designation Motion. We AFFIRM in part and VACATE in part the order denying the Discovery Requests.

FACTS

Lakeridge filed a chapter 11 petition on June 16, 2011. It owned and operated a commercial real estate development in Reno, Nevada (the "Property"). It purchased the Property in January 2004 and financed the purchase with a loan, evidenced by a promissory note, from Greenwich Financial Products, Inc. Apparently, USB now holds the fully secured claim for the balance due on this loan, which amounts to about $10 million; this is the only secured claim in the bankruptcy case.

The sole member of Lakeridge is MBP Equity Partners 1, LLC ("MBP"). Kathie Bartlett ("Bartlett") is a member of the board of managers of MBP. The only unsecured claim listed in Lakeridge's bankruptcy schedules was one for $2,761,000.00 held by MBP (the

3. For USB's full authority as trustee, see caption.

"MBP Claim").[4] Bartlett signed the bankruptcy petition and all related documents on behalf of Lakeridge.[5]

Lakeridge filed a Disclosure Statement and Plan of Reorganization on September 14, 2011.[6] The only claims addressed in the Disclosure Statement and Plan were the fully secured claim of USB and the MBP Claim.

On October 27, 2011, Rabkin purchased the MBP Claim for the sum of $5,000.00. A Notice of Assignment of the MBP Claim to Rabkin was filed with the bankruptcy court on November 4, 2011.

A hearing was held on the Disclosure Statement on November 7, 2011. It does not appear that the Rabkin assignment was discussed at the hearing. The bankruptcy court approved the Disclosure Statement by order on November 23, 2011.

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4. The schedules also listed about $50,000 in tenant deposits as unsecured claims. Later, Lakeview withdrew classification of those deposits as unsecured claims when it assumed the leases; USB has not challenged Lakeridge's position.

5. None of the papers signed by Bartlett indicate her title. We are unable to determine from the record the precise nature of her position and authority in Lakeridge other than that she is a member of the board of managers. She described her position at her deposition as "representative of both the Village at Lakeridge, LLC and the equity owners." Bartlett Dep. 9:10-11, February 9, 2012. However, the parties do not dispute that she was the officer of the debtor responsible for its filings or that she is an "insider" of the debtor.

6. With changes not relevant in this appeal, the Plan of Reorganization was amended on November 4, 2011, and January 12, 2012.

Bartlett was deposed by USB on February 9, 2012, in her capacity as a representative of Lakeridge.

On June 7, 2012, Rabkin testified at a USB deposition. Early in his deposition, Rabkin testified that he had attended a meeting one hour before the deposition with his counsel and counsel for Lakeridge. When asked what he discussed with Lakeridge's counsel, Lakeridge's attorney objected, invoking the "common interest privilege." Rabkin Dep. 11:20-2, June 7, 2012. Rabkin's counsel joined in the objection and ultimately directed Rabkin not to answer the question.

Rabkin testified to the following matters in that deposition: (1) that he had both a business and close personal relationship with Bartlett; (2) that he saw Bartlett regularly, including on the day of the deposition; and (3) that he purchased the MBP Claim for $5,000 as a business investment and expected to be paid a pro rata dividend of $30,000 under the Lakeridge plan. As to any other interest in the Lakeridge bankruptcy case, Rabkin testified as follows:

> USB COUNSEL: Other than getting paid in this bankruptcy case, do you have any other concerns?
>
> RABKIN: I'm concerned that I may run up a lot of expenses and get paid nothing.
>
> USB COUNSEL: Other than getting paid the $30,000, do you care whether the Village at

> Lakeridge plan gets confirmed? Setting aside the payment, if you were to get paid the $30,000, would you care if the plan was confirmed?
>
> RABKIN: I have no other interest in the Village at Lakeridge.

Rabkin Dep. 82:3-14.

Near the end of the deposition, USB, through counsel, offered to purchase the MBP Claim from Rabkin for $50,000; when he declined, counsel increased the offer to $60,000. Rabkin did not accept the offer.[7]

Shortly after the Rabkin deposition, USB by letter requested that the bankruptcy court intervene in two discovery disputes in the bankruptcy case: (1) whether the common interest privilege applied so as to protect disclosure of communications between Rabkin and Lakeridge's counsel; and (2) to compel Bartlett to sit for a second deposition, this time in her individual capacity as opposed to her first deposition as representative of Lakeridge (previously defined as the "Discovery Requests").

The bankruptcy court held a hearing on June 21, 2012, on USB's Discovery Requests. After reviewing letter

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7. At a hearing on August 29, 2012, Rabkin indicated that he felt USB's counsel took advantage of a deponent who was under oath by pressuring him to accept a cash offer without an adequate chance to review it. The bankruptcy court would later apologize to Rabkin "on behalf of the legal profession" for the offensive conduct of USB's attorney in the deposition. Hr'g Tr. 21:1-2, August 29, 2012.

briefs from USB, Lakeridge and Rabkin, and hearing from their counsel, the court ruled on the record that the Ninth Circuit's decision in *United States v. Gonzalez*, 669 F.3d 974 (9th Cir. 2012) supported the application of the common interest privilege in this case and denied USB's request to compel Rabkin to disclose his communications with Lakeridge's attorneys. As to USB's request for a second deposition for Bartlett, the court ruled that she had been extensively examined already and the court would not require a second examination.

On July 1, 2012, USB filed the Designation Motion. USB contended in that motion that Rabkin was a statutory insider by virtue of the assignment of the MBP insider claim to him, and that he was a non-statutory insider because of his relationship with Bartlett. USB also argued that the assignment of the claim to Rabkin was in bad faith. Lakeridge responded, arguing that Rabkin was neither a statutory nor a non-statutory insider, and that there was no bad faith involved in Rabkin's acquisition of the claim.

The bankruptcy court held an evidentiary hearing on the Designation Motion on August 1, 2012. USB, Lakeridge, and Rabkin were represented by counsel, and Rabkin and Bartlett testified.

After a recess, the bankruptcy court announced its decision on the record. It granted the Designation Motion in part and denied it in part. The court entered an order to memorialize its ruling on August 20, 2012 (the "Designation Order").

First, the Designation Order recited that "The court finds and concludes as a matter of law that Dr. Rabkin is not a non-statutory insider because, among other things: (a) Dr. Rabkin does not exercise control over the Debtor; (b) Dr. Rabkin does not cohabit with Ms. Bartlett and does not pay Ms. Bartlett's bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett." Designation Order at ¶ 2, August 20, 2012. The bankruptcy court also concluded that the converse was true: that Bartlett exercised no such control or provided gifts to Rabkin.

Next, the bankruptcy court decided that the MBP Claim "was not assigned to Dr. Rabkin in bad faith." Designation Order at ¶ 3. It explained that Dr. Rabkin was not compelled to sell his claim to USB, his purchase of the MBP claim was a legitimate investment, and that Bartlett never asked him to vote in favor of the plan.

However, the bankruptcy court reasoned, "Because [MBP] is a statutory insider, Dr. Rabkin, as the assignee of the claim, acquired the same status as a statutory insider when he purchased the claim." Designation Order at § 6. The court supported its conclusion with citation to several authorities. The Designation Order gave no other explanation for its ruling that Rabkin was a statutory insider. As a consequence, the court decided that "[b]ecause Dr. Rabkin's vote cannot be considered for voting purposes in order to confirm the Debtor's Plan, the Debtor does not have an impaired, assenting class of claims necessary to confirm his Plan." Designation Order at ¶ 9.

Lakeridge and Rabkin both filed timely appeals of the Designation Order. USB also filed a timely cross-appeal challenging the provision of the Designation Order that Rabkin was not a non-statutory insider, and also seeking review of the bankruptcy court's prior order denying the Discovery Requests.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A), (L) and (O). We have jurisdiction under 28 U.S.C. § 158.

ISSUES

1. Whether the bankruptcy court erred in deciding that Rabkin was an insider of Lakeridge under § 101(31).

2. Whether the bankruptcy court erred in deciding that Rabkin's acceptance of the Lakeridge plan would be excluded under § 1129(a)(10).

3. Whether the bankruptcy court erred in declining to designate that Rabkin's acceptance of the plan was not in good faith for purposes of § 1126(e).

4. Whether the bankruptcy court abused its discretion in declining to order that Bartlett submit to a second deposition.

5. Whether the bankruptcy court erred in refusing to compel Rabkin to answer questions during his deposition based on the common interest privilege.

Appendix B

STANDARDS OF REVIEW

Whether a party is an insider in relation to a debtor is a question of fact reviewed for clear error. *Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman)*, 126 B.R. 63, 67 (9th Cir. BAP 1991). In making this determination, the bankruptcy court must determine, "on a case-by-case basis whether the relationship between a creditor and its debtor, considered in the light of the statutory scheme, amounts to an 'insider' relationship." *Id.*

We review issues of statutory construction, including a bankruptcy court's interpretation of the Bankruptcy Code, *de novo. Samson v. W. Capital Partners, LLC (In re Blixseth)*, 684 F.3d 865, 869 (9th Cir. 2012). Construction and application of § 1129(a)(10) is reviewed *de novo. W. Real Estate Equities, LLC v. Vill. at Camp Bowie I, LP (In re Village at Camp Bowie I, LP)*, 710 F.3d 239, 2013 U.S. App. LEXIS 3949 * 17 (5th Cir. 2013).

We review good faith determinations under § 1126(e) for clear error. *Figter Ltd. v. Teachers Ins. & Annuity Ass'n of Am. (In re Figter Ltd.)*, 118 F.3d 635, 638 (9th Cir. 1997).

The bankruptcy court's decisions resolving deposition disputes are reviewed for an abuse of discretion. *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1009 (9th Cir. 2004).

A trial court's application of the attorney-client privilege is reviewed *de novo. United States v. Richey*, 632 F.3d 559, 563-64 (9th Cir. 2012). The common interest

privilege is an extension of the attorney-client privilege. *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012).

De novo review requires the Panel to review an issue independently, without giving deference to the bankruptcy court's conclusions. *First Ave. W. Bldg., LLC v. James (In re Onecast Media, Inc.)*, 439 F.3d 558, 561 (9th Cir. 2006); *Cal. Franchise Tax Bd. v. Wilshire Courtyard (In re Wilshire Courtyard)*, 459 B.R. 416, 423 (9th Cir. BAP 2011).

Clear error is found when the reviewing court has a definite and firm conviction that a mistake has been committed. *Lewis v. Ayers*, 681 F.3d 992, 998 (9th Cir. 2012).

We apply a two-part test to determine objectively whether the bankruptcy court abused its discretion. *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009)(*en banc*). First, we "determine *de novo* whether the bankruptcy court identified the correct legal rule to apply to the relief requested." *Id.* Second, we examine the bankruptcy court's factual findings under the clearly erroneous standard. *Id.* at 1262 & n.20. We must affirm the bankruptcy court's factual findings unless those findings are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" *Id.*

Appendix B

DISCUSSION

I.

Rabkin was neither a statutory nor a non-statutory insider of debtor Lakeridge under § 101(31).

The fundamental issue raised in this appeal is whether Rabkin was an "insider" as to Lakeridge. If he was an insider, his vote to accept the Lakeridge plan must be excluded under § 1129(a)(10).

The Bankruptcy Code definition of an insider in § 101(31) for a case involving a corporate debtor[8] provides:

> The term "insider" includes– . . .
>
> (B) if the debtor is a corporation—
>
> (I) director of the debtor;
>
> (ii) officer of the debtor;
>
> (iii) person in control of the debtor;
>
> (iv) partnership in which the debtor is a general partner;

8. The definition of "corporation" in the Bankruptcy Code includes unincorporated limited liability companies, such as Lakeridge. § 101(9)(A)(4); *In re Longview Aluminum, LLC*, 657 F.3d 507, 509 n.1 (7th Cir. 2011).

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor; . . .

(F) managing agent of the debtor.

If a word or phrase is defined in the statute, then that definition governs. *Perroton v. Gray (In re Perroton)*, 958 F.2d 889, 894 (9th Cir. 1992) (citing *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979)). A term appearing in several places in the statute is ordinarily interpreted as having the same meaning each time it appears. *Warfield v. Salazar (In re Salazar)*, 465 B.R. 875, 879-880 (9th Cir. BAP 2012) (citing *Ratzlaf v. United States*, 510 U.S. 135, 143, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994)).

It is not disputed that Rabkin would not be included in any of the categories of insiders set forth expressly in § 101(31): he is not a director, officer, or a controlling party, relative of a controlling party, or a managing agent of Lakeridge. However, the statutory list of insiders is not exclusive. *See* 11 U.S.C. § 101(31) ("The term insider includes . . . ."); § 102(3) (explaining that, when used in the Code, the term "includes" is not limiting); *In re Bonner Mall P'ship*, 2 F.3d 899, 912 (9th Cir. 1993); *Miller Ave. Prof'l & Promotional Servs v. Brady (In re Enterprise Acquisition Partners, Inc.)*, 319 B.R. 626, 631 (9th Cir. BAP 2004) ("The definition of 'insider' in 11 U.S.C. § 101(31) is not limiting: the use of the word 'includes' is

indicative of Congress's intent not to limit the classification of insiders to the statutory definition."). In other words, Rabkin could be deemed an insider as to Lakeridge even if he did not fall into one of the classifications listed in the statute. The parties in this appeal and others sometimes refer to such parties as "non-statutory insiders."

A. The bankruptcy court did not err in determining that Rabkin was not a non-statutory insider of Lakeridge.

Because the Code's definition of an insider is not exclusive, courts must necessarily develop the factors that may render a party a non-statutory insider. As explained by the Panel, at bottom, this category includes those individuals or entities whose business or professional relationship with the debtor "compels the conclusion that the individual or entity has a relationship with the debtor, close enough to gain an advantage attributable simply to affinity rather than to the course of business dealings between the parties." *In re Friedman*, 126 B.R. at 70. Put another way, a non-statutory insider is one "who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." *Id.* (quoting S. Rep. No. 95-989, 95th Cong., 2nd Sess. 25 (1978) and H. R. Rep. No. 95-595, 95th Cong. 1st Sess. 312 (1977), *reprinted in* U.S. CODE CONG. & ADMIN. NEWS, 1978, pp. 5787, 5810, 6269). In determining whether a creditor qualifies as a non-statutory insider, courts look at the closeness of the parties, and the degree to which the creditor is able to exert control or influence over the debtor. *In re Entm't*

Acquisition Partners, Inc., 319 B.R. at 626; *Miller v. Schuman (In re Schuman)*, 81 B.R. 583, 586 (9th Cir. BAP 1987). The primary test of a non-statutory insider is whether the creditor "exercises such control or influence over the debtor as to render their transaction not arms-length." *Id.* In the context of debtor-creditor relations, "[a]n arm's-length transaction is '[a] transaction in good faith in the ordinary course of business by parties with independent interests. . . . The standard under which unrelated parties, each acting in his or her own best interest, would carry out a particular transaction.'" *Anstine v. Carl Zeiss Meditec AG (In re U.S. Medical, Inc.)*, 531 F.3d 1272, 1277 n.4 (10th Cir. 2008) (quoting BLACK'S LAW DICTIONARY 109 (6th ed. 1990)).

Besides the control test and examination for an arms-length transaction, other courts have expanded the non-statutory insider group to include those with a close personal or romantic relationship with the debtor. *Kaisha v. Dodson*, 423 B.R. 888, 901 (N.D. Cal. 2010) (woman who was romantically involved with debtor considered an insider for stock transfer purposes); *In re Demko*, 264 B.R. 404, 408 (Bankr. W.D. Pa. 2001)(cohabitation may render individual an insider); *In re McIver*, 177 B.R. 366 (Bankr. N.D. Fla. 1995)(live-in girlfriend may be insider); *but see In re Reinbold*, 182 B.R. 244, 246 (D. S.D. 1995) (holding that mere cohabitation is insufficient and that "a *de facto* or *de jure* family relationship is required.").

In sum, then, to find that a party is a non-statutory insider as to a debtor, the bankruptcy court must consider: (1) the closeness of the parties and the relative control each

has over the other, and (2) whether the degree of control is such that it would render its transaction with the debtor not arms-length.

Here, the bankruptcy court found that, despite his personal relationship with Bartlett, there was no control exerted by Rabkin over Lakeridge and/or Bartlett, and vice versa. Hr'g Tr. 77:25-78:6. The court also indicated in its comments on the record that it had reviewed the case law concerning personal relationships and determined that they would not support USB's argument that the relationship between Rabkin and Bartlett was such as to confer non-statutory insider status on Rabkin:

> The cases that have found non-statutory insiders have involved generally cohabitation, longer periods of association, associations in which the property that the parties become economically entwined, they share checking accounts or sign on each other's checking accounts. They use each other's credit cards. They share each other's property. There was not any of that sort of activity in this case.

Hr'g Tr. 77:14-24.

The bankruptcy court heard testimony from Rabkin and Bartlett concerning Rabkin's motivations for purchasing the MBP Claim, the lack of control exerted by either Rabkin or Bartlett over each other's actions, and the nature of their relationship. The court concluded in its Designation Order:

> The court finds and concludes as a matter of law that Dr. Rabkin is not a non-statutory insider because, among other things: (a) Dr. Rabkin does not exercise control over the Debtor; (b) Dr. Rabkin does not cohabit with Ms. Bartlett and does not pay Ms. Bartlett's bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett.

Designation Order at ¶ 2, August 20, 2012. As noted above, whether a party is an insider is a question of fact we review for clear error. The bankruptcy court's determination in this case was consistent with case law and supported by the testimony of the witnesses and other evidence presented at the hearing. While others might come to a different conclusion, where two permissible views of the evidence exist, the fact finder's choice between them cannot be clearly erroneous. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

We conclude that the bankruptcy court did not clearly err in deciding that Rabkin was not a non-statutory insider as to Lakeridge. We therefore reject USB's contention in the cross appeal that Rabkin was a non-statutory insider and AFFIRM this portion of the bankruptcy court's decision.

B. The bankruptcy court erred in determining that, by acquiring MBP's insider claim, Rabkin also automatically became a statutory insider of Lakeridge.

As noted above, none of the parties asserted that Rabkin was a statutory insider of Lakeridge as specified in the statute, because he was clearly not a member of one of the enumerated categories in § 101(31)(B). Despite this, however, in its order, the bankruptcy court reasoned, "[b]ecause [MBP] is a statutory insider, Dr. Rabkin, as the assignee of the claim, acquired the same status as a statutory insider when he purchased the claim." Designation Order at § 6. In short, the bankruptcy court apparently ruled that, as a matter of law, a non-insider becomes a statutory insider automatically by acquiring an insider claim. In making this decision, the court did not rely upon any facts other than the existence of the assignment of Bartlett's claim to Rabkin.

The bankruptcy court's conclusion is not supported in the case law it cited for the proposition and, indeed, it is inconsistent with the Panel's published decisions. The Panel has on multiple occasions explained that "insider determination . . . is made on a case-by-case basis, after the consideration of various factors." *In re Friedman*, 126 B.R. at 70 (quoting *In re Schuman*, 81 B.R. at 586 n.1). That the inquiry as to insider status is fact-intensive, and made on a case-by-case basis, is generally supported in the case law. *Browning Interests v. Allison*, 955 F.2d 1008, 1011 (5th Cir. 1992) (holding that a non-statutory insider status must be determined by a factual inquiry into the Debtor's

relationship with the alleged insider); *Hyman v. Korshak & Assocs. (In re Island One, Inc.)*, 2013 Bankr. LEXIS 662 *6 (Bankr. M.D. Fla. 2013) ("This more nebulous 'non-statutory' insider status must be determined by a factual inquiry into the Debtor's relationship with the alleged insider. The determination is fact-intensive and must be made on a case-by-case basis."); *In re Velo Holdings*, 472 B.R. 201, 208 (Bankr. S.D.N.Y. 2012) (insider status can be "be determined on a case-by-case basis from the totality of the circumstances"). *Accord In re Smith*, 415 B.R. 222, 233 (Bankr. D. Haw. 2009); *Rainsdon v. Farson (In re Farson)*, 387 B.R. 784, 792 (Bankr. D. Idaho 2008).

Two of the three cases cited by the bankruptcy court in its ruling do not support its conclusion that when, by purchase or assignment, a non-insider acquires a claim from an insider, the new holder of the claim also assumes insider status. One case cited by the court, *In re Applegate Prop., Ltd.*, 133 B.R. 827 (Bankr. W.D. Tex. 1991) does not deal with the purchase of an insider claim by a non-insider. Instead, that case dealt with the purchase of a non-insider claim by an insider, as the result of which the bankruptcy court deemed the insider's acceptance of a plan excluded for purpose of voting under § 1129(a) (10) because the claimant was, independent of the claim, an insider. The other case cited by the bankruptcy court, *In re Holly Knoll P'ship*, 167 B.R. 381, 386 (Bankr. E.D. Pa. 1994), is nearly identical, in that it also dealt with an insider purchasing a non-insider claim. In that case, the court also conducted an inquiry that considered more than the simple transfer of the claim in examining the claimant's insider status. *Id.* at 798-99. As can be seen,

in both of these cases, the bankruptcy courts understood that the transfer or assignment of a claim did not alone change the status of the claimant, and that further inquiry was necessary to determine that status.

The one case cited by the bankruptcy court that partly supports its conclusion that a non-insider who acquires an insider claim "steps into the shoes of that claimant" is the unpublished decision of our Court of Appeals, *In re Greer W. Investment Ltd. P'ship*, 81 F.3d 168 [published in full-text format at 1996 U.S. App. LEXIS 8495], 1996 WL 134293 (9th Cir. Mar. 25, 1996). However, even this case does not tie the status of the claimant solely to the status of the claim he acquired. After agreeing with the bankruptcy court that the non-insider "assumed the claim subject to its insider status," the Ninth Circuit continued its analysis with "we next address whether [claimant] is an insider." 1996 U.S. App. LEXIS 8495, 1996 WL 134293 at *3. Upon further examination, the Ninth Circuit determined that the claimant was in fact an insider where the debtor exercised considerable control over the creditor or vice versa. We take both of these observations to mean that the assignment or purchase of a claim does not by itself change the insider status of the claimant without further inquiry and factual findings to support designating a creditor as an insider.

There is also a logical and legal inconsistency in the bankruptcy court's reasoning that the assignment of a claim by itself may change the insider status of the claimant. If assignment of an insider claim to a non-insider alone changes the non-insider's status to insider, then it

would follow that an assignment or purchase of a non-insider claim by an insider would change the insider into a non-insider. As both the *Applegate* and *Holly Knoll* courts observed, that cannot be allowed because, both before and after the assignment, the insider is still an insider.

The bankruptcy court applied an erroneous legal rule in this case when it determined that Rabkin, who was otherwise a non-insider, became an insider in the Lakeridge bankruptcy case by merely purchasing an insider's claim. This portion of the bankruptcy court's decision is therefore REVERSED.

II.

Since the bankruptcy court failed to make appropriate findings regarding the insider status of Rabkin, it was error to exclude Rabkin's acceptance of the plan of reorganization under § 1129(a)(10).

Section 1129 provides the requirements for confirmation of a chapter 11 plan of reorganization. Of interest in this appeal is one such requirement, § 1129(a)(10). This provision dictates that, if a chapter 11 plan proposes to impair a class or classes of claims, to be confirmed at least one impaired class must affirmatively accept the plan, and that class acceptance must be determined without including the "acceptance of the plan by any insider."[9]

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9. Section 1129 provides "(a) The court shall confirm a plan only if all of the following requirements are met: . . . (10) If a class of claims is impaired under the plan, at least one class of claims that is

In this case, Lakeridge has just two creditors. Its proposed plan separately classified each creditor: Class 1 for secured creditor USB and Class 3 for Rabkin, the sole unsecured creditor. Because the plan does not provide for full payment to Class 3 creditors, that class is impaired. § 1124(1) (providing that a class is impaired unless, as to each claim in the class, the plan leaves unaltered the contractual rights of the claim). According to a ballot summary submitted to the bankruptcy court on July 30, 2012 by Lakeridge's counsel, Class 1 (USB) voted to reject the plan. However, Class 3 (Rabkin) voted to accept the plan.[10] Thus, if Rabkin's accepting vote is counted, Class 3 has accepted the plan, and Lakeridge has satisfied § 1129(a)(10).

Since the bankruptcy court determined that Rabkin was an insider, though, his vote would necessarily be excluded in determining whether Class 3 had accepted the plan. We conclude the bankruptcy court's decision that his vote must be excluded was incorrect because Rabkin was not an insider, and § 1129(a)(10) does not require

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impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider."

10. At oral argument before the Panel, counsel for USB suggested that Rabkin placed a condition on his accepting vote, "that he receive more money." We have examined the record and find no support for this allegation. Indeed, a copy of Rabkin's ballot is included in the bankruptcy docket at no. 240, Exhibit B, attached to Lakeridge's Certificate of Acceptance and Rejection of Chapter 11 Plan [Ballot Summary]. The ballot contains only a check mark after "accepts" and is signed by Rabkin with his address. There are no indications of a condition on the ballot.

that his acceptance of the Lakeridge plan be excluded in determining whether Class 3 accepted that plan.[11] We therefore REVERSE that portion of the bankruptcy court's order determining that Rabkin's vote to accept the plan must be excluded.

III.

The bankruptcy court did not err in declining to designate that Rabkin's acceptance of the plan was not in good faith for purposes of § 1126(e).

Even if Rabkin is not an insider and his claim is not excluded under § 1129(a)(10), USB argues that his acceptance of the Lakeridge plan should be "designated" under § 1126(e). That Code provision permits the bankruptcy court, on request of a party in interest, to disqualify any plan vote that was not made in good faith, or that was not solicited in good faith or in accordance with

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11. A leading treatise has described the test under § 1129(a)(10) as "somewhat mechanical on its face, and thus would not under a plain meaning analysis permit an inquiry into motive" of the accepting creditor. 7 COLLIER ON BANKRUPTCY § 1129.02[10] (Alan N. Resnick & Henry J. Somer, eds. 16th ed. 2009). Some courts have suggested that attempts to artificially manufacture classes to obtain an accepting impaired non-insider class raise questions under § 1129(a)(10). *Windsor on the River Assocs. v. Balcor Real Estate Fin. (In re Windsor on the River Assocs)*, 7 F.3d 127, 132 (8th Cir. 1993). We decline to import an intent or purpose requirement into § 1129(a)(10). *In re Hotel Assocs. of Tucson*, 165 B.R. at 474. However, we note that, in § 1129(a)(3), the Code also requires, as a condition of confirmation, that the plan proponent prove that the plan has been proposed in good faith.

the provisions of the Bankruptcy Code.[12] The bankruptcy court declined to designate Rabkin's acceptance here, and we perceive no error in this decision.

In this context, "good faith" does not require a creditor to act with selfless disinterest:

> If a person seeks to secure some untoward advantage over other creditors for some ulterior motive, that will indicate bad faith. *See In re Marin Town Ctr.*, 142 B.R. 374, 378-79 (N.D. Cal. 1992). But that does not mean that creditors are expected to approach reorganization plan votes with a high degree of altruism and with the desire to help the debtor and their fellow creditors. Far from it.

In re Figter Ltd., 118 F.3d at 638-39. Put another way, a creditor acting out of self-interest "is not to be condemned simply because it frustrated [some other creditor's] desires." *Id.* at 639. On the other hand, if a person seeks to secure some untoward advantage over other creditors for some ulterior motive, that will indicate bad faith for purposes of § 1126(e). *Id.* at 639.

Rabkin testified that he purchased the MBP Claim as a business investment with the expectation of receiving

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12. "On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title." § 1126(e).

a $30,000 return through the Lakeridge plan on a $5,000 investment. Rabkin Dep. 82:3-14. USB contends that Rabkin was involved in a romantic relationship with Bartlett, a principal of Lakeridge, and conspired with her to acquire the MBP claim solely to accept Lakeridge's plan of reorganization. On the one hand, Rabkin's argument that he was interested in making money is not an example of bad faith. *In re Figter*, 118 F.3d at 638. On the other hand, the acquisition of a claim solely to create an impaired assenting class may constitute bad faith under § 1129(a)(3). *In re Hotel Assocs. Of Tucson*, 165 B.R. 470, 475 (9th Cir. BAP 1994).

USB insists that Rabkin did not act in accordance with his financial interests, and as evidence, it points to his deposition where counsel for USB offered Rabkin $50,000, and then $60,000, to acquire his claim, which would generate an immediate profit of $20,000-30,000 above what Rabkin expected to gain through the plan. According to USB, Rabkin's refusal to take the bait clearly demonstrated his motive in the case was something other than financial gain. When a creditor appears to act against self-interest, that may be an indication of bad faith. *In re Hotel Assocs. Of Tucson*, 165 B.R. at 475.

The bankruptcy court addressed this argument both at the hearing on August 29, 2012, and in the order denying USB's motions. At the hearing, Rabkin expressed outrage that he was pressured to make a deal in the context of a deposition hearing. The court agreed that USB's tactic was "appalling" and apologized "on behalf of the legal profession" for USB's counsel's behavior. Hr'g Tr. 21:1-2.

In the order, the court characterized USB's ploy during the deposition as "offensive" and noted that Rabkin was under no obligation to accept the offer. Designation Order at ¶ 3. The court also decided in the order that Rabkin's purchase of a $2,671,000.00 unsecured claim under these circumstances for $5,000, with a $30,000 expected gain, was an example of a speculative investment and that no special due diligence was required by Rabkin. *Id.*

As to USB's arguments concerning the Rabkin-Bartlett personal relationship, the bankruptcy court made several findings on the record, discussed above, indicating that the evidence presented to him did not support insider standing on the basis of a putative romantic relationship between Rabkin and Bartlett. Designation Order at ¶ 2. In addition, in the order, the court found that, on the evidence before it, "Ms. Bartlett did not ask Dr. Rabkin to vote in favor of the Debtor's Plan." Designation Order at ¶ 3(c). In general, bad faith solicitation of a vote requires a "specific request" for a creditor's official vote. *In re Bataa/Kierland, LLC*, 476 B.R. 558, 565 (Bankr. D. Ariz. 2012) (citing *Century Glove v. First Am. Bank of New York*, 860 F.2d 94, 102-03 (3d Cir. 1988).

Whether Rabkin's vote on the Lakeridege plan should be designated as "not in good faith" under § 1126(e) is a question of fact reviewed for clear error. *In re Figter*, 118 F.3d at 638. The bankruptcy court considered the testimony and evidence on this question and made adequate findings on the record and in the order to support its conclusions. *Anderson*, 470 U.S. at 573-74 (Where two permissible views of the evidence exist, the fact finder's

choice between them cannot be clearly erroneous.). The bankruptcy court did not clearly err in declining to designate that Rabkin's acceptance of the plan was not in good faith for purposes of § 1126(e). We AFFIRM the bankruptcy court's decision in this respect.

IV.

The bankruptcy court did not abuse its discretion in refusing to order that Bartlett submit to a second deposition.

Rules 9014 and 7030 incorporate Civil Rule 30 in contested matters. Civil Rule 30 states, "Unless otherwise stipulated or ordered by the Court, a deposition is limited to 1 day of 7 hours." Civil Rule 26, also incorporated in this context by Rules 9014 and 7026, provides in relevant part,

> When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> (I) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Civil Rule 26(b)(2)(C).

USB contends that Bartlett was originally deposed only in her capacity as representative of Lakeridge, and not in her personal capacity. Lakeridge and Rabkin counter that USB did indeed have the opportunity in the first deposition to question Bartlett about personal matters, including her relationship with Rabkin. At the hearing on June 12, 2012, the bankruptcy court declined to order Bartlett to appear at a second deposition because USB already had the opportunity to question Bartlett in the deposition on personal matters as part of an "extensive" discussion. The record on appeal supports this conclusion:

> Q: When was that [MBP Claim] transferred to Mr. Rabkin?
>
> BARTLETT: I believe it was in October. October 17th, something like that. In 2011.
>
> Q: And . . . that's after the Village filed for bankruptcy?
>
> BARTLETT: Yes.

Q. The most recent time?

BARTLETT: Yes. . . .

Q. Okay. Did you know Mr. Rabkin before?

BARTLETT: I did. . . .

Q: Did you know him personally? Were you guys friends?

BARTLETT: Yes.

Bartlett Dep. 55:14-20, February 9, 2012.

The bankruptcy court's ruling that USB had ample opportunity to obtain the information it needed at the original deposition is consistent with Civil Rules 30 and 26, and is not (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record. The bankruptcy court did not abuse its discretion in refusing to order that Bartlett submit to a second deposition.

V.

The bankruptcy court made insufficient findings in support of its ruling concerning the application of the common interest privilege.

Whether the bankruptcy court correctly determined that the common interest privilege applied to protect

Rabkin's discussions with Lakeridge's attorney is an issue of law we review *de novo*. *Richey*, 632 F.3d at 563-64; *Gonzalez*, 669 F.3d at 978.

The bankruptcy court announced its decision on the record of the hearing on June 21 regarding the Discovery Requests, including its ruling that the common interest privilege applied and Rabkin was not required to respond to questions from USB's counsel about his discussions with Lakeridge's lawyer. The bankruptcy court was apparently unaware that the Ninth Circuit had just issued a published opinion relating to the common interest privilege a few weeks earlier, on May 10, 2012, in *Pac. Pictures Corp. v. U.S. Dist. Ct.*, 679 F.3d 1121 (9th Cir. 2012).

The Common Interest Privilege (also known as Joint Defense Privilege) has long been recognized in the Ninth Circuit. *Gonzalez*, 669 F.3d at 978 (9th Cir. 2012); *Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964). The bankruptcy court relied on *Gonzalez* in which the Ninth Circuit held that the privilege was applicable in both civil and criminal proceedings, and was based on the principle that "persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." *Gonzalez*, 669 F.3d at 978. This privilege applies in bankruptcy proceedings. *In re Mortg. & Realty Trust*, 212 B.R. 649, 653 (Bankr. C.D. Cal. 1997). The privilege does not require a written agreement, and its application may be implied by "conduct and situation." *Gonzalez*, 669 F.3d at 978 (quoting *Continental Oil*, 330 F.2d at 350).

Appendix B

The bankruptcy court received a letter from Rabkin's attorney describing the nature and scope of the communications at issue:

> In advance of his [scheduled] Deposition, Rabkin and [his counsel] met with [Lakeridge's counsel at their office] to discuss in general terms the types of questions to expect at the deposition. The meeting lasted for 40 minutes and Rabkin anticipated that the discussions were being held in confidence. Later, at the deposition, counsel for lender [USB] asked deponent Rabkin what had been discussed at the meeting []. Smith and Hartman each asserted the common interest privilege and Hartman directed Rabkin not to answer any questions relating to the meeting at [Lakeridge Counsel's Office].

Lakeridge and Rabkin shared a common interest in that they both wanted to obtain confirmation of the plan of reorganization, Lakeridge as the debtor and plan proponent, and Rabkin for his financial interests. As a result, while they had separate counsel, they were engaged in furtherance of a common legal enterprise. *Gonzalez*, 669 F.3d at 981 ("In the context of the joint defense privilege, only communications made in course of ongoing common enterprise and intended to further that enterprise are protected."). Rabkin believed that his communications with Lakeridge's attorney were protected as confidential, and asserted the common interest privilege before the bankruptcy court. *Gonzalez*, 669 F.3d at 981 ("The common interest rule requires communication to be given

in confidence and that the client reasonably understood it to be so given.").

The bankruptcy court noted that "I believe there is a Common Interest Privilege. I believe the Ninth Circuit has defined it. . . So your motion is denied." Hr'g Tr. 9:7-11, June 21, 2012.

However, because the bankruptcy court was not aware of the newer, *Pac. Pictures* opinion, it did not make the necessary finding that, in addition to all the factors discussed above, it was necessary to determine if there was an express or implied agreement between the parties to pursue a joint strategy:

> Rather than a separate privilege, the "common interest" or "joint defense" rule is an exception to ordinary waiver rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with each other. *See Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965); *see also In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) (collecting cases). However, a shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within this exception. *Id. Instead, the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement — whether written or unwritten. Cf. Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964).

Pac. Pictures Corp., 679 F.3d at 1130 (emphasis added).

Because the bankruptcy court did not make the necessary finding that, in addition to sharing a common interest in the outcome of the litigation, an express or implied agreement existed between Rabkin and Lakeridge to pursue a joint strategy, we must VACATE that portion of the order denying the Discovery Requests relating to the common interest privilege.

CONCLUSION

We AFFIRM that part of the bankruptcy court's order denying the Discovery Requests that Bartlett need not submit to a second deposition. We VACATE the part of that order that the common interest privilege applied to Rabkin's discussions with Lakeridge's attorney.

As to the Designation Order, we AFFIRM the bankruptcy court's decision that Rabkin is not a non-statutory insider, and AFFIRM its decision declining to designate that Rabkin's acceptance of the plan was not in good faith for purposes of § 1126(e). We REVERSE the bankruptcy court's decision that Rabkin is a statutory insider, and REVERSE the decision excluding Rabkin's vote to accept the plan. We VACATE that part of the order deciding that the Debtor does not have an impaired, assenting class of claims necessary to confirm the plan, and the decision denying confirmation of the Lakeridge plan of reorganization. We REMAND these matters to the bankruptcy court for further proceedings consistent with this decision.

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT, DISTRICT OF NEVADA, DATED AUGUST 20, 2012

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

Case No. 11-51994-BTB

Chapter 11

In re:

THE VILLAGE AT LAKERIDGE, LLC
AKA MAGNOLIA VILLAGE, LLC,

Debtor.

ORDER GRANTING U.S. BANK'S MOTION TO (A) DESIGNATE CLAIM OF ROBERT RABKIN AS INSIDER CLAIM AND (B) DISALLOW SUCH CLAIM FOR VOTING PURPOSES

Date: August 1, 2012

Time: 10:00 a.m.

Place: Courtroom 2
300 Booth Street
Reno, NV 89509

On July 1, 2012, U.S. Bank National Association, as Trustee, as successor-in-interest to Bank of America,

N.A., as Trustee, as successor by merger to LaSalle Bank National Association, as Trustee, for the registered holders of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2005-GG3, Commercial Mortgage Pass Through Certificates, Series 2005-GG3, by and through, CWCapital Asset Management LLC, solely in its capacity as Special Servicer (hereinafter referred to as "*Lender*"), filed a motion to designate the claim of Dr. Robert Rabkin as an insider claim, and to disallow the claim for voting purposes (Ct. Dkt. #194) (the "*Motion*"), along with the Declaration of Keith C. Owens in Support thereof (Ct. Dkt. #198). Among other things, the Motion sought to designate Dr. Rabkin's claim as an insider claim and to disallow his claim for voting purposes because: (a) the insider claim assigned to Dr. Rabkin did not lose its status as an "insider claim" simply because the claim was assigned to Dr. Rabkin after the bankruptcy filing; (b) Dr. Rabkin is a non-statutory insider for purposes of 11 U.S.C. § 101(31), and therefore, the claim should be designated as an insider claim, and Dr. Rabkin's vote in favor of the Debtor's Plan of Reorganization (Ct. Dkt. 48) as modified by the Second Amendment To Debtor's Plan Of Reorganization (Ct. Dkt. 109) (collectively the "*Plan*") cannot be counted; and (c) Dr. Rabkin's vote should not be considered and the Plan should not be confirmed because the assignment of the insider claim to Dr. Rabkin was made in bad faith, and solely to create an impaired, consenting class for purposes of cramdown.

The Debtor filed an opposition to the Motion (Ct. Dkt. #213) and the Declaration of Robert Rabkin in support thereof (Ct. Dkt. #214), and the Lender filed a reply to the

opposition (Ct. Dkt. #218). Although Dr. Rabkin provided a declaration in support of Debtor's opposition, he did not file his own response or reply to the Motion.

Concurrently with the filing of the Motion, Lender filed an application for order shortening time (the "*Application*") to schedule a hearing on shortened notice prior to the plan confirmation hearing scheduled for August 1, 2012 (Ct. Dkt. #195-97). The Court granted the Application, and scheduled a hearing thereon on July 19, 2012 (Ct. Dkt. #202). On July 18, 2012, the Court advised the parties that the hearing on July 19, 2012, would be used as a status and scheduling conference pursuant to Local Rule 9014(a)(6). The parties appeared as scheduled on July 19, 2012. The Court scheduled an evidentiary hearing on the Motion for the date previously scheduled for the confirmation hearing, August 1, 2012, at 10:00 a.m. The Court also rescheduled the confirmation hearing to September 26, 2012, at 10:00 a.m.

At the hearing on July 19, 2012, the Court granted the Lender's oral request to submit supplemental authority arising from Judge Zive's decision that day on the allowance or designation of claims in *In re Tee Investment Co.*, Case No. BK-N-11-50615-GWZ (Bankr. D. Nev. July 19, 2012). In permitting the filing of supplemental authority, the Court ordered that the parties could not file additional briefs on the Motion.

On July 23, 2012, the Lender filed a notice of supplemental authority as permitted by the Court (Ct. Dkt. #228). On July 30, 2012, the Debtor filed a supplemental brief in opposition to the Motion (Ct. Dkt. #243).

Appendix C

On July 30, 2012, in addition to the evidence filed by the Lender in support of its Motion, the Lender lodged 17 exhibits with the Court for the hearing pursuant to Local Rule 9017(d), including the following: (1) the transcript of Dr. Rabkin's deposition taken on June 7, 2012 (Ct. Dkt. #198, Ex. 1); (2) the notice of rescheduled deposition of Dr. Rabkin and production of documents; (3) a letter from Jeffrey L. Hartman dated May 23, 2012, in response to the request for production of documents, attaching the assignment of creditor MBP Equity Partners I, LLC's claim and a copy of a cancelled check from Dr. Rabkin to MPB Equity Partners I, LLC, in the amount of $5,000; (4) the notice of assignment of claim from MPB Equity Partners I, LLC to Dr. Rabkin (Ct. Dkt. #78); (5) Debtor's Schedule F (Ct. Dkt. #1); (6) Debtor's plan of reorganization filed September 14, 2011 (Ct. Dkt. #48) (the "*Plan*"); (7) the first amendment to the Plan filed on November 4, 2011 (Ct. Dkt. #76); (8) the second amendment to Plan filed on January 12, 2012 (Ct. Dkt. #109); (9) the offer dated June 7, 2012, from CWCapital Asset Management to Dr. Rabkin to purchase the claim (Ct. Dkt. #198, Ex. 2); (10) the deposition transcript of the Debtor taken February 9, 2012; (11) Memorandum amending and clarifying oral findings and conclusions, *In re Tee Investment Co.*, Case No. BK-N-11-50615-GWZ (Bankr. D. Nev., Ct. Dkt. #320, filed July 20, 2012) (Ct. Dkt. #228, Ex. 1); (12) Transcript, July 19, 2012, *In re Tee Investment Co.*, Case No. BK-N-11-50615-GWZ (Bankr. D. Nev., Ct. Dkt. #321, filed July 20, 2012) (Ct. Dkt. #228, Ex. 2); (13), Order, *In re Caviata Attached Homes, LLC*, Case No. BK-N-09-52786-GWZ, 2010 WL 8500043 (Bankr. D. Nev. April 12, 2010) (Ct. Dkt. #228, Ex. 3); (14) Petition, schedules, and statement of financial affairs filed June 16,

2011 (Ct. Dkt. #1); (15) Debtor's first amended disclosure statement filed November 16, 2011 (Ct. Dkt. #82); (16) Claims Register; and (17) Amended Proof of Claim No. 1 filed by the Lender on January 13, 2012.

The Court held an evidentiary hearing on the Motion (the "*Hearing*") on August 1, 2012, at 10:00 a.m., the Hon. Bruce T. Beesley presiding. Alan R. Smith, Esq., and Holly E. Estes, Esq., of the Law Offices of Alan R. Smith appeared on behalf of the Debtor. Ms. Kathie Bartlett, a member of the Board of Managers of MBP Equity Partners 1, LLC, which is the owner and managing member of the Debtor, also appeared at the Hearing; Louis M. Bubala III, Esq., of Armstrong Teasdale, LLP, and Keith C. Owens, Esq., and Ben D. Whitwell, Esq., of Venable LLP, appeared on behalf of the Lender; and Jeffrey L. Hartman, Esq., of Hartman & Hartman, appeared on behalf of Dr. Robert Rabkin. Dr. Rabkin also appeared at the Hearing.

Dr. Rabkin was sworn in and examined by Debtor's counsel, cross-examined by the Lender's counsel, and examined by the Court. Ms. Bartlett then was sworn in and examined by Debtor's counsel, cross-examined by the Lender's counsel, and examined by the Court. Dr. Rabkin's counsel did not examine either witness, but provided an explanatory statement after the examinations. Following those examinations, argument was presented by counsel for the Debtor and the Lender. Dr. Rabkin's counsel did not provide any argument.

The Court, having reviewed and considered all of the papers filed in support of and in opposition to the Motion, the evidence presented by the parties prior to and at

the time of the Hearing including, without limitation, the testimony of Dr. Rabkin and Ms. Bartlett, and the arguments of counsel; the Court, having found that notice of the Motion and of the Hearing was sufficient and proper under the circumstances, and that no further notice is required; the Court, having stated its Findings of Fact and Conclusions of Law (collectively, the "*Findings*") orally on the record pursuant to Federal Rule of Bankruptcy Procedure 9014 and Federal Rule of Bankruptcy Procedure 7052, incorporating by reference Federal Rule of Civil Procedure 52, which Findings are hereby incorporated into this Order as though fully set forth herein;[1]

THE COURT HEREBY ORDERS, FINDS AND DECREES AS FOLLOWS:

1. The Motion is granted in part and denied in part

2. The Court finds and concludes as a matter of law that Dr. Rabkin is not a non-statutory insider because, among other things, (a) Dr. Rabkin does not exercise control over the Debtor; (b) Dr. Rabkin does not cohabitate with Ms. Bartlett, and does not pay Ms. Bartlett's bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett; (d) Ms. Bartlett does not exercise control over Dr. Rabkin; (e) Ms. Bartlett does not pay Mr. Rabkin's bills or living expenses; and (f) Ms. Bartlett has never purchased expensive gifts for Dr. Rabkin.

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1. Any Findings of Fact that are Conclusions of Law shall be treated as such, and any Conclusions of Law that are Findings of Fact shall be treated as such.

3. The Court finds and concludes that MBP Equity Partners 1, LLC's insider claim was not assigned to Dr. Rabkin in bad faith to create an impaired, consenting class for purposes of cramdown because, among other things, (a) despite Lender's offensive offer to purchase his claim during Dr. Rabkin's deposition for twice as much as Dr. Rabkin could recover under the Debtor's Plan, Dr. Rabkin was not required to sell his claim to the Lender, (b) Dr. Rabkin's not having conducted extensive due diligence as to how such claim would be treated under the Debtor's Plan, was not dispositive of bad faith because Dr. Rabkin's purchase of the MBP Equity Partners 1, LLC claim in the amount of $2,671,000.00 for $5,000.00 was a speculative investment and the due diligence conducted was sufficient under the circumstances, and (c) Ms. Bartlett did not ask Dr. Rabkin to vote in favor of the Debtor's Plan.

4. However, the Court finds and concludes as a matter of law that MBP Equity Partners 1, LLC, is a statutory insider of the Debtor as defined by 11 U.S.C. § 101(31).

5. Dr. Rabkin acquired the claim of MBP Equity Partners 1, LLC (Ct. Dkt. #78) after the Debtor's bankruptcy filing.

6. Because MBP Equity Partners 1, LLC, is a statutory insider, Dr. Rabkin, as the assignee of the claim, acquired the same status as a statutory insider when he purchased the claim. *See e.g., In re Applegate Prop., Ltd.*, 133 B.R. 827 (Bankr. W.D. Texas 1991); *In re Holly Knoll P'ship*, 167 B.R. 381 (Bankr. E.D. Penn. 1994); *and In re Greer W. Inv. L.P.*, 81 F.3d 168, 1996 U.S. App. LEXIS 8495, 1996 WL 134293 (9th Cir. March 25, 1996) (table).

7. The Plan contained two impaired classes of claims, consisting of (1) the claim of MBP Equity Partners 1, LLC, transferred to Dr. Rabkin; and (2) the claim of the Lender (Ct. Dkt. #240, Ballot Summary). Dr. Rabkin voted in favor of the Plan, while the Lender voted against the Plan (Ct. Dkt. #240).

8. Dr. Rabkin's vote to accept the Plan cannot be considered to determine acceptance of the Plan by an impaired class of claims pursuant to 11 U.S.C. § 1129(a)(10). *See In re Holly Knoll P'ship*, 167 B.R. 381, 385 (Bankr. E.D. Pa. 1994); *In re Applegate Prop., Ltd.*, 133 B.R. 827, 833 (Bankr. W.D. Tex. 1991); *Matter of Heights Ban Corp.*, 89 B.R. 795, 799 (Bankr. S.D. Iowa 1988).

9. Because Dr. Rabkin's vote cannot be considered for voting purposes in order to confirm the Debtor's Plan, the Debtor does not have an impaired, assenting class of claims necessary to confirm its Plan.

10. Because the Plan cannot be confirmed as a matter of law, confirmation of the Plan is hereby **DENIED,** and the Plan confirmation hearing currently scheduled for September 26, 2012, at 10:00 a.m. is hereby **VACATED.**

11. If the Debtor intends to pursue an amended plan of reorganization, the Debtor shall be required to file an amended plan of reorganization and disclosure statement not later than 30 days from the date of the hearing of this Motion (*i.e.*, on or before August 31, 2012).

12. If the Debtor files an amended plan of reorganization and disclosure statement on or before August 31, 2012, the

Court shall conduct a hearing on the disclosure statement on September 26, 2012, at 10:00 a.m. To the extent necessary, the Court hereby shortens the necessary time for notice and a hearing as permitted by Federal Rule of Bankruptcy Procedure 9006 and Local Rule 9006. The briefing schedule shall be controlled by Local Rule 9014.

13. The Court also shall conduct the continued hearing on the Lender's Motion for Relief From Automatic Stay to Foreclose on Debtors Property (Ct. Dkt. #26) (the "*Motion for Relief from Stay*"), and the Debtor's Motion for Authority to Use Cash Collateral (Ct. Dkt. # 17) (the "*Cash Collateral Motion*"), on September 26, 2012, at 10:00 a.m.

IT IS SO ORDERED.

# # #

In accordance with LR 9021, counsel submitting this document certifies that the order accurately reflects the court's ruling and that (check one):

__ The court has waived the requirement set forth in LR 9021(b)(1).

__ No party appeared at the hearing or filed an objection to the motion.

__ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and any unrepresented parties who appeared at the hearing, and

each has approved or disapproved the order, or failed to respond, as indicated below:

A. Smith/*H. Estes* (Debtor) Delivered Via Email, 8/16/12 **Approve**/Disapprove

J. Hartman/I. Quddus (Dr. Rabkin) Delivered Via Email, 8/16/12 **Approve**/Disapprove

__I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant to LR 9014(g), and that no party has objected to the form or content of the order.

ARMSTRONG TEASDALE LLP

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Counsel for the Lender

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 16, 2016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-60038
BAP No. 12-1456

IN RE: THE VILLAGE AT LAKERIDGE, LLC,
FKA MAGNOLIA VILLAGE, LLC,

Debtor,,

U.S. BANK N.A., TRUSTEE, *ET AL.*, BY AND THROUGH CWCAPITAL ASSET MANAGEMENT LLC, SOLELY IN ITS CAPACITY AS SPECIAL SERVICER,

Appellant,

v.

THE VILLAGE AT LAKERIDGE, LLC,

Appellee,

ROBERT ALAN RABKIN,

Real Party in Interest.

Appendix D

No. 13-60039
BAP No. 12-1474

IN RE: THE VILLAGE AT LAKERIDGE, LLC,
FKA MAGNOLIA VILLAGE, LLC,

Debtor,

U.S. BANK N.A., TRUSTEE, *ET AL.*, BY AND
THROUGH CWCAPITAL ASSET MANAGEMENT LLC,
SOLELY IN ITS CAPACITY AS SPECIAL SERVICER,

Appellant,

v.

THE VILLAGE AT LAKERIDGE, LLC,

Appellee,

ROBERT ALAN RABKIN,

Real Party in Interest.

ORDER

Before: CLIFTON and N.R. SMITH, Circuit Judges and LASNIK,* Senior District Judge.

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* The Honorable Robert S. Lasnik, Senior District Judge for the U.S. District Court for the Western District of Washington, sitting by designation.

Appendix D

Judge N.R. Smith has voted to deny the petition for rehearing *en banc*, and Judge Lasnik has so recommended. Judge Clifton has voted to grant the petition for rehearing *en banc*.

The full court was advised of the petition for rehearing *en banc* and no judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The petition for rehearing *en banc* is DENIED.